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In The
Supreme Court of the United States

OCTOBER TERM, 1985

No. _____

ROBERT JULIAN TAYLOR

Appellant,

v.

H. F. MOONEY, JR., as Superintendent of the West Virginia Department of Public Safety, and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor,

Appellees.

JURISDICTIONAL STATEMENT

Submitted by:

Brennan and Francis
Attorneys at Law
P. O. Drawer 68
New Martinsville, WV 26155

James A. McLaughlin
and
Thomas C. Cady
Attorneys at Law
Morgantown, WV
Of counsel to Appellant.

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THE QUESTION PRESENTED BY THIS APPEAL

DOES A 1977 WEST VIRGINIA STATE STATUTE SCHEME FOR THE DISCHARGE FOR CAUSE OF PERMANENT MEMBERS OF THE STATE POLICE FORCE VIOLATE THE PROCEDURAL MANDATES OF FOURTEENTH AMENDMENT DUE PROCESS OF LAW WHERE IT PROVIDES FOR NO PRE-DISCHARGE OPPORTUNITY TO RESPOND TO ALLEGATIONS OF THE CAUSE FOR DISCHARGE AND WHERE THE POST-DISCHARGE EVIDENTARY HEARING IS BEFORE AN AD HOC UNIFORMED PANEL OF SEVEN POLICE OFFICERS CONVENED BY THE DISCHARGING AUTHORITY WHO IS ALSO THE COMMANDER AND EMPLOYER (WITH STATUTORY POWER TO PROMOTE, DEMOTE, TRANSFER, SUSPEND OR DISMISS) OF EACH MEMBER OF THE UNIFORMED HEARING PANEL AND WHERE SUCH CONVENING COMMANDER TAKES AN ACTIVE ADVERSARY ROLE AS A PARTY AGAINST HIS DISCHARGED EX-EMPLOYEE BEFORE THE SUBORDINATE UNIFORMED HEARING PANEL?

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JURISDICTIONAL STATEMENT
THE QUESTION PRESENTED BY THIS APPEAL

(See page before Table of Contents)

OPINIONS BELOW

On November 6, 1986, the West Virginia Supreme Court of Appeals dismissed Appellant's petition for an appeal without opinion or statement of reason. A copy of the order is printed in the Appendix. The Circuit Court of Kanawha County rendered a letter opinion which is reproduced in the Appendix. The appeal board made a finding of fact and conclusion of law which is reproduced in the Appendix.

JURISDICTION OF THIS COURT

This is an appeal from a West Virginia Supreme Court of Appeals order dismissing a petition for an appeal from a circuit court decision ruling that a state statute, §15-2-6 *West Virginia Code* of 1931 as amended, did not violate the federal constitution.

The West Virginia Supreme Court of Appeals order was entered on November 6, 1985. A notice of appeal was filed

with the clerk of the West Virginia Supreme Court of Appeals on January 31, 1986.

The jurisdiction of this Court is based on 28 U. S. C. 1257(2). See also, *Cox Broadcasting Corp v. Cohn* 420 U. S. 469 (1975), and *Rohr Aircraft Corp. v. County of San Diego*, 362 E. S. 628 (1960).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution, Clause 1, reads in pertinent part: ...Nor shall any State deprive and person of life, liberty, or property, without due process of law...

§15-2-1 et. seq. of the *West Virginia Code* of 1931 as amended is lengthy. §15-2-6, is set out vervatim in the Appendix.

STATEMENT OF THE CASE

Appellant was a corporal and commander of the Paden City, West Virginia, state police detachment when he was fired by then-Superintendent Harley Mooney on January 16, 1979, after 17 years of theretofore "unblemished service" with the Department of Public Safety.[1]

Superintendent Mooney accomplished the discharge by ordering Appellant (then Corporal Taylor) to appear in his office at noon on January 16, 1979, at which time he

[1] Appellant's entitlement to his job and rank is unequivically established by §15-2-5 and 21, *W. Va. Code* of 1931 as amended. This fact was not challenged by the West Virginia Attorney General representing the Appellees below. *Compare Bishop v. Wood*, 426 U. S. 341 (1976). There this Court found that under North Carolina law, which this Court was bound by, the policeman held his position at the "will and pleasure of The City," i.e., under North Carolina law the policeman was not "entitled" to his job and the Court felt "foreclosed from making an independent examination ofthe state-law issue." Id. at 347. Under West Virginia law, Code § 15-2-21 (last paragraph) members of the Department have a "probationary period of eighteen months" after which they may appeal if they are suspended, demoted or discharged which may only be "for any of the following causes: [listing ten cause]" (first paragraph). In § 15-2-5 the act states: "The Superintendent may appoint from the membership of the Department eleven principal supervisors who shall receive the compensation and hold the

served upon Appellant Special Order #10, which discharged Appellant from the Department of Public Safety forthwith. At the same time he served upon Appellant a letter setting forth the reasons for the discharge. Appellant filed an appeal of such order with discharge as was authorized by §15-2-6 of the *W. Va. Code*. As prescribed by the same section an ad hoc board of appeals was picked by lot by Superintendent Mooney from the uniformed members of his command. The board chosen consisted of a captain, lieutenant, master sergeant, first sergeant, sergeant, trooper first class, and trooper. The board was ordered to convene by Special Order #24 and #24(a) signed by Superintendent Mooney. The captain was elected chairman of the appeals board.

A hearing was held on March 15, 16, 19 and 20, 1979, at the West Virginia State Police Academy, in Institute, West Virginia. Appellant was represented by his private attorney and Superintendent Mooney was represented by an assistant attorney general of his personal choice. Appellant's attorney was denied the opportunity to *voir dire* the members of the board. Appellant's attorney objected to the composition and conduct of the hearing as violation (among other laws) the Fourteenth Amendment of the United States Constitution. A stenographic record was made of the hearing.

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temporary rank of lieutenant colonel, major, or captain *at the will and pleasure* of the Superintendent....Any person appointed to a temporary rank...shall retain his *permanent rank*....Upon termination of a temporary appointment...the member shall be *entitled* to the *full rights and privileges of his permanent rank*." (Emphasis added.) From this it is clear that a uniformed member of the Deparment of Public Safety, after 18 months of probation, is "entitled" to remain unless he commits a specific act giving the Superintendent "cause" to demote him and only "temporary ranks" are at "the will and pleasure" of the Superintendent. In deed when a member loses a temporary rank (to which he has no "entitlement") he immediately is "entitled" to his"permanent rank." Thus, whatever may be the law in other states or before the 1977 act in West Virginia, after 1977 in West Virginia, a uniformed member of the Department of Public Safety has an entitlement not only to his job but to his permanent rank.

On March 20, 1979, the appeal board orally announced its decision to sustain the Superintendent's order of dismissal. On April 14, 1980, the appeal board issued its written findings, conclusion and order. (Reproduced in the Appendix hereto.)

Appellant filed his appeal to the Kanawha County Circuit Court as authorized by §15-2-6, West Virginia Code, by filing a "substituted Petition for Appeal from Order of an Administrative Tribunal on June 12, 1980. The Superintendent answered. The Appeal was designated Civil Case No. AP-CA-80-78. A briefing schedule was established and on June 1, 1981, the final brief was submitted. No oral argument was allowed in the appeal. No new evidence was introduced. The four volume transcript of the administrative hearing held in March of 1979 was the record on appeal. In Appellant's Substituted Petition, he specifically challenged the constitutionality of the department discharge and appeal process as mandated by §15-2-6, West Virginia Code as violating the Fourteenth Amendment to the United States Constitution. In a 43-page Brief and 38-page Reply Brief, Appellant fully argued the federal issues challenging the constitutionality of the §15-2-6, West Virginia Code, discharge and appeal scheme.

On September 7, 1984, the circuit court not having acted, Appellant sought a Writ of Mandamus from the West Virginia Supreme Court of Appeals. On November 4, 1984, a pre-emptory Writ of Mandamus issued commanding the circuit court to render a final decision within twenty days. *State of West Virginia ex. rel. R. J. Taylor v. The Honorable A. Andrew MacQueen, Judge of the Circuit Court of Kanawha County*, 322 S. E. 2nd 809 (W. Va. 1984).

On November 30, 1984, Judge MacQueen rendered a descision by letter opinion. (*See* Appendix.) On February 4, 1985, Judge MacQueen entered a final order affirming the Board of Appeals decision. (*See* Appendix.)

Appellant filed a petition for an appeal pursuant to Rule 3 of the Rules of Appellate Procedure, in the West Virginia Supreme Court of Appeals on May 6, 1985, and made an oral presentation on May 21, 1985. On July 9, 1985, Appellant's attorneys were notified by telephone that the petition had been denied. Appellant filed a supplemental petition and made another oral presentation on September 10, 1985. Appellant was advised by letter from the clerk of the Supreme Court of appeals dated November 6, 1985, that the second petition was denied. (*See* Appendix.)

We are here appealing that denial having raised issues of the constitutionality of the West Virginia statutory discharge scheme contained in Department of Public Safety Reorganization Act of 1977 at every step and in every available West Virginia forum.

REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

In 1977, the West Virginia legislature passed the "West Virginia Department of Public Safety Reorganization Act." (*See* §15-2-1 et. seq., West Virginia Code of 1931 as amended.) §15-2-6 of the new act as codified reproduced *in toto* in the Appendix to this Jurisdictional Statement) provides for appeals of departmental transfers, suspensions, demotions in rank and discharges to *ad hoc* in-house "boards of appeals." No doubt this was a good faith effort by the legislature to give peer review of various decisions of the Departmental Superintendent that adversely affected its employees. The Act as a whole gave tenured or entitlement status to the uniformed members of the Department. (*See* footnote #1 above under Statement of the Case.)

However, it is an unfortunate irony that rather than create new rights in a fair procedure, the new act

eliminated an existing fair system[2] and, at least as to discharges, created a system wholly at odds with the fundamentals of procedural due process as taught by this Court. Although Appellant attacks the rather lengthy §15-2-6 as a whole, a cataloguing of its individual blemishes is a revealing first step.

a.) The Act does not provide for, encourage or even authorize a pre-discharge process that allows the "accused" a fair opportunity (or any meaningful opportunity) to respond to the charges that may be the "cause" of his discharge. Thus, it ignores this Court's teaching for more than a decade as most recently amplified in *Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985).* (*See also Davis v. Schere*, 468 U. S. _____ , 82 L. Ed. 2nd 139 (1984) (especially Note #10 at 82 L. E. 2nd 148.)

True the Act does not flatly prohibit such pre-discharge opportunity. §15-2-6, (fourth paragraph) states: "Within fifteen days after a member of the department has received a notice of transfer *or a statement of charges and an order of* suspension, demotion in rank or *discharge* by the Superintendent, he may appeal..." (Emphasis added.) But such language certainly would encourage the Superintendent to believe that a "statement of charges" was to be given contemporaneously with an order of discharge.

And that is exactly what happened in this case. (*See* Statement of the case.) An Administrative discharge act ought to mandate or prescribe such a pretermination opportunity to respond, not, as here, positively discourage it. See also §15-2-21, W. Va. Code of 1931 as amended. Such discouragement, when acted on, makes

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[2] In *State ex rel. Goodwin v. Bonar*, 155 W. Va. 202, 183 S. E. 2nd 697 (1971), the West Virginia Court approved the old system wherein the Governor appointed two independent persons to review the Superintendent's discharge decision and if they deadlocked then the Governor himself, the Superintendent's superior, became the tie-breaking arbiter.

the discharge unconstitutional, and certainly is a first step in making the whole of §15-2-6 unconstitutional. As Justice White emphasized in *Cleveland Bd. of Education v. Loudermill*, _____ U. S. at _____ , 105 S. Ct. at 1494:

> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in accurate decision. Dismissals for cause will often involve factual disputes....Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

Here Appellant disputed the factual basis for his discharge but even if the facts were true a seventeen year member of the force never before in trouble might have persuaded a decisionmaker that his negligence in not knowing that the ex-coustable riding with him had stolen from his employer the walkie talkie he carried was not grounds for outright dismissal.

b.) The Act in establishing the "peer review board" has three features that make the fundamental unfairness of a decisionmaker's decision being reviewed by his subordinates poignantly acute. First, although the selection of each board is "by lot," each new member is notified by the Superintendent and "the Superintendent shall determine whether the reasons alleged by the member [if he requests to be relieved] are sufficient cause to relieve the member of such assignment."

In other words, the Superintendent is the convenor of the quasi-courts-martial.

Second, the Superintendent is made an active party to the appeal: "The Superintendent may be represented by counsel of his choice." "In any other appeal [e. g., a discharge] the Superintendent has the burden of proof as to the charges alleged."

Third, since the appeal comes after the discharge, the board is in uniform, the appellant in mufti - a *former* peer. Of course, the ultimately important fact is that each member of the board is the superintendent's subordinate and the subordinate in a paramilitary organization. The Superintendent has the power to promote to permanent rank (§15-2-9, W. Va. Code)[3], to promote all officers and eleven supervisors who hold the rank of lieutenant colonel, major or captain "at the will and pleasure of the superintendent" (§15-2-4, W. Va. Code). He also has the power to transfer (§15-2-20), demote, suspend or discharge (§15-2-21, §15-2-6) any member of the appeal board selected to hear his case against their former peer. It is not unlike having a jury composed entirely of a plaintiff's employees.

There are actually three strands of biasing influence involved in this West Virginia statutory procedure. I will identify and briefly cover each: 1) Judging one's own case, 2) Pecuniary interest and 3) Command Influence.

The proscription against being a judge in one's own case is a doctrine of ancient lineage. It travelled under the Latin rubric, "nemo debit esse judex in propia causa." In 1610 Lord Coke declared it to be a maxim of the Common Law above Parliament as well as above the King. *D. Bonham's case*, 8 Co. 114a, 118a. *See* Bowen, *The Lion and the Throne, The Life and Times of Sir Edward Coke* 315 (1957) for an informal account of this case. In 1978, this Court declared it to be "one of the great first principals of the social compact." *Calder v. Bull*, 3 Dall. 386 (1798).

The fact that the adjudicative officers, here, were not

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[3] "The Superintendent shall promote a member to the permanent rank of trooper first class, corporal, sergeant, first sergeant, master sergeant, or lieutenant from among the top three names on the current list of eligible candidates established by the promotion evaluation board for each rank." Of course, by the same section he has the power to select the promotion evaluation board.

identical with the plaintiff-appellee but his employees, if anything, makes it worse. For if one makes "a realistic appriasal of psychological tendencies and human weakness," *Withrow v. Larkin*, 421 U. S. 35, 47 (1975), it would seem far easier to overrule oneself than one's superior. The *Withrow* case reminds us of what this case is *not* about. Appellant is *not* contending that we have here an impermissible combination of investigative and adjudicative functions. Had an independent body investigated the case, found probable cause, and then had a full trial on the merits, our case would be much weaker, as *Withrow v. Larkin* held. For judges "preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial" and this "has [not] been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the, trial is without a jury, against making the necessary determination of guilt or innocence." *Id.* at 56 In *Withrow* the court reiterated that "[n]ot only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 47 The court was careful to distinguish *Gagnon va. Scarpelli*, 411 U. S.778 (1973), and*Morrissey v.Brewer*, 408 U. S. 471 (1972). "These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. . . . Allowing a decisionmaker to review and evaluate his own prior deicsions raises problems that are not present here." *Id.* at 58 n. 25.

Again, the situation here is even worse than the ones *distinguished* in *Withrow*, for the Superintendent did not review his own prior decision, his subordinates did. In one case, the combination of investigation and adjudication was narrowly upheld (5-3) where the adjudicator was not identical to the investigator but the adjudicator "was

subject to the supervision and control of officals in the Immigration Service charged with investigative and prosecuting functions." *Marcello v. Bonds*, 349 U. S. 302, 311 (1955). Of course, there are striking contrasts between *Marcello* and this case (besides "the special considerations applicable to deportation" found crucial by the Court, at 311): there the adjudicator was simply "subject to the supervision of district directors of the district to which they were assigned, as well as higher service officials, all with enforcement responsibilities" id. at 306, i.e., subject to the general supervision of people with general enforcement responsibilities; not, as here, subject to the specific supervision (Captain Lemmon, Chairman of the Appeal Board, was even subject to demotion solely "at the will and pleasure" of the colonel) of one who had specifically investigated this case, made a decision, and was a party at the hearing to appeal that decision.

But even for the hearing panel to be under the general superviser and control the job of the judge before whom enforement (a much watered down version of the bias in our case) was too much for the late Justices Hugo Black and Felix Frankfurter to bear (Justive Douglas dissented on other grounds). Black declared (at 318): "The idea of letting a prosecutor judge the very case he prosecutes or superviser and control the job on the judge before whom his case is presented is wholly inconsistent with our concepts of justice."

Closely related to judging one's own case is the doctrine against having any pecuniary interest in the case one judges.

> Every procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might cause him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.

Tumey v. Ohio, 273 U. S. 510 (1927). In *Ward v. Village of Monroeville*, 409 U. S. 57 (1972), this Court applied the *Tumey* principle to invalidate a mayor's court where the fines collected from traffic offenses adjudicated there were a major part of village income, and the mayor also had "executive responsibility for village finances."

In *Gibson v. Berryhill*, 411 U. S. 564 (1973), the Court expressly applied this doctrine to administrative adjudicators. The Court affirmed the District Court's conclusion "that success in the [Optometry] Board's efforts [in hearing cases of license revocation for unethical conduct in practicing optometry as employees of a business corporation, when the Board was composed entirely of independent optometrists] would possibly redound to the personal benefit of members of the Board [by decreasing competition] sufficiently so that . . . the Board was constitutionally disqualified." *Id.* at 578.

Surely here "psychological reality" about the felt fears and pressures of adjudicating a case involving as a keenly interested party, the person who is directly responsible for one's continued tenure and promotion, makes the felt "pecuniary interest" of the adjudicators far from insubstantial. Would any judge ever fail to excuse for cause of propective juror who was the employee of one of the parties? Appellant faced an entire jury of such jurors in the hearing below.

The military nature of the Department of Public Safety suggests yet another powerful psychological influence for bias on the appeal board: command influence. In the military justice system an elaborate doctrine to protect against "undue command influence" has been established. *See* West, *A History of Command Influence on the Military Judicial System*, 18 U. C. L. A. Rev. 1 (1970) for an exhaustive study of the subject.

In spite of the existing doctrine, including specific statutory proscription of such influence (10 U. S. C. §837, Art. 37 unlawfully influencing action of court) it is still a

matter of grave concern (see, e. g., Schiesser, & Benson, *A Proposal to Make Courts-martial Courts: The Removal of Commanders from Military Justice*, 7 Texas Tech. L. Rev. 559 (1976) including proposals for legislative change). During the First Session of the 91st Congress (1969) Senator Tydings submitted a proposal for an independent Military Trial Command. In the 92nd Congress Senator Bayh submitted a similar but more extensive proposal. In explaining his reasons for introducing his bill, Senator Bayh said: "As long as the remotest possibility of undue command influence remains, we will never be able to avoid the implication - or at least the appearance - of fundamental unfairness." Cong. Rec. S2550 (daily ed.), March 8, 1972, quoted in Barker, *Command Influence: Time for Revision*? 26 UAGU (Navy) 43, 44 (1971).

The procedure prescribed by W. Va. Code §15-2-6 and used in the hearing under review is *per se* undue command influence, and a denial of fundamental fairness. To understand why this assertion is true one need understand but two facts: One, a court martial is convened by a "convening authority" who generally is a commanding officer of a large unit, size of unit dependent on the type court martial - General, Special or Summary. (In West Virginia, for example only the Governor can convene a general court martial (W. Va. Code §15-1E-3).) The commanding officer sets the whole process in motion, and then sits back like an absentee landlord. Two, it is unlawful for an accuser to convene a court-martial for the trial of the person so accused. When the ordinary convening authority is the accuser, he must refer the matter to a superior authority. 10 U. S. C. §833(b) and §823(b) (1970). Ironically only forty some pages from §15-2-6, is the West Virginia proscription against an accuser convening a court-martial. §15-1E-24, W. Va. Code of 1931, as amended.

For the convening authority to be not only the accuser,

but the intial decisionmaker, a party at the trial, and a witness is simply unthinkable. Appellant is, of course, arguing by analogy because technically this was not a court martial, nor governed by the Code of Military Justice, but the analogy could hardly be closer. If undue command influence is fundamentally unfair in the military it is fundamentally unfair here also.

Thus the conjunction of all three biasing influences is evident in the procedure established by §15-2-6: the "plaintiff"-appellee is to have his own case judged by his employee-subordinates, his "agents," who surely have a felt pecuniary interest in their job security and advancement and to whom the habit of command obedience is a way of professional life.

c) Finally, the Act does not *guarantee* a genuine *de novo* hearing. The denial of any meaningful process before discharge is exacerbated by the wording of §15-2-6, which encourages an appellant like review of an *ex parte* decision. The legislature probably intended a de novo hearing before the "appeal board" under §15-2-6, but the statutes wording and the very structure of the process established discourage such a hearing in fact. That a de novo hearing is intended is fairly inferable from the requirement that the Superintendent bear the burden of proof but the remainder of §15-2-6, *supra*, shows it to be but a word of promise to the ear, broken to the hope.

A de novo type hearing before a final decision is absolutely essential to the whole process. Even if this Court could now give us a trial de novo (impossible of course if only the cold record is used) it would not cure the

unfairness of the original denial. In *Marshall v. Jerrico, Inc.*, 446 U. S. 238 100 S. Ct. 1610 1615-16 n. 9 (1980). The Court stated:

> In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), we held that the availability of a trial de novo before an unbiased judge did not remove the constitutional infirmity in an original trial before one whose impartiality was impaired. A litigant, we said, "is entitled to a neutral and detached judge in the first instance."

If the bias of such tribunal cannot be so cured neither can the lack of a de novo hearing. West Virginia Code §15-2-6 probably contemplates a de novo hearing. It says the superintendent has the burden of proof as to the charges alleged, but it is ambiguous or, at least, subject to being misunderstood. But then in a later paragraph the Act enjoins a determination of "whether or not the superintendent's order shall be sustained." This has the sound of appellate review. Moreover, §15-3-6 constantly uses the word "appeal" (some 23 times) in referring to the process of review and uses "appeal or Hearing" (5 times) and refers to "the member making the *appeal* shall have a public ***hearing***. . . ." So its use of the wording "hearing" alone (6 times) seems to imply a hearing of the appeal. All of this suggests the review of a decision already made to determine its reasonableness. Such words are not conclusive nor is the fact the parties were called "appellant" and "appellee" at the hearing in this case conclusive (the statute does not use those terms) but it is suggestive. The form the hearing took was trial-like. Live witnesses were called, sworn and testified and a record was kept. Opening statements and closing arguments were made. But appearances are often deceiving—form masking substance. In the Court blow appeallant made a detailed argument from the hearing transcript that he did not get a de novo hearing, an argument impossible to make at this stage. However, for

purposes of this Jurisdictal Statement Appeallant will make a brief comparison of a de novo process and an appellant process and show the clear possibility for confusion in this case.

The standard of proof at a trial or de novo type review is either preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt. All imply weighing the evidence, i.e., looking at both side's case and choosing the weighter case -- often a matter of choosing the more credible of two seemingly credible cases each based on substantial evidence. On appeal, the standard of review is usually the Substantial Evidence Rule or as often put when reviewing a jury verdict, "could reasonable minds have reached the conclusion under review?" It is not a choice between two sides but the review of the reasonableness of a choice made by another. Under the substantial evidence rule -- a choice (i.e., lower decision) is reasonable if it is supported by substantial evidence. To take the simplest example: If plaintiff's witness A says X is true and defendant's witness B says X is not true, then the determination of whether or not X is true (given this as the only evidence of X) is a choice between the credibility of A and B. If decisionmaker D decides X is true having heard A and B, and if A and B are both credible, on review his decision will be affirmed even if the reviewing body would have made the opposite choice if it had been the original decisionmaker. In other words, if A and B are both credible, then either choice D would have made would be affirmed on review.

Now if D is both reviewing a decision of another decisionmaker finding X to be true (call him "sub D") and also hearing all the evidence of X (i.e. A and B's testimony) D may not know if he is to review "sub D's" choice, which he would affirm if both A and B are credible or, having heard all the evidence, make his own choice between A and B. D could easily become confused as to

his role.

Lawyers know that when it is clear that the earlier decisionmaker (subD) could not in fact have made a choice because he had only A's statement, then D has a duty to choose between A and B's testimony, and not simply determine whether or not A was credible, i.e., that "sub D's" decision was reasonable. When it is D's duty to make such a genuine choice, but he, in fact, reviews "subD's" non-choosing decision, then the adverse party (the party relying on B) has had no hearing at all.

In this case the statute surely suggested and fundamental fairness demanded that the Board of Appeals make a new choice and not review another's choice. The statute suggests it because it says the Superintendent has the burden of proof -- a trial not a review term. No one has "burden of proof" in appellant cases or under judicial review in the Administrative Procedures Act. Moreover, fundamental fairness demands it here because (a) there was no record before the Board of Appeals showing on what the former decisionmaker (Superintendent Mooney) based his decision, and (b) in fact the Superintendent made no choice at all because he had seen only one side of the case.

What we are here contending is that what the Board did was to hear the evidence and then decide the "Appeal" as if the Superintendent had heard *all* the evidence that they heard and as if he had based his decision on a choice between the conflicting witnesses.

Frankly, it is impossible to know with any confidence what the Board did in fact do. But taken all in all, they must surely have been unduly influenced by the fact that their superior had already made a decision, was still convinced of its propriety and the hearing was an "appeal" to determine if it should be "sustained." They had no legal advisor to correctly inform them of their role.

In view of the natural bias oftheir position in relation to the prior decisionmaker, the statute utterly fails to protect against the potential for a mere review as opposed to a genuine trial de novo.

APPENDIX

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APPENDIX

ORDER

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 6th day of November, 1985, the following order was made and entered, to-wit:

Robert Julian Taylor vs. H. F. Mooney, Jr., etc., et al.

On a former day, to-wit, May 6, 1985, came the petitioner, Robert Julian Taylor, by Michael S. Francis and James A. McLaughlin, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 5th day of February, 1985, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused.

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

ROBERT JULIAN TAYLOR,

Appellant,

v. AP-CA-80-78

H.F. Mooney, Jr., individually, and as Superindentent of the West Virginia Department of Public Safety, and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor,

Appellees.

ORDER

On November 30, 1984, this Court issued a letter memorandum settinf forth the Court's opinion regarding the issues in this judicial review of the administrative proceedings surrounding the discharge of appellant from the West Virginia Department of Public Safety. The pleadings, briefs, and other documents filed below raised the following issues:

1. Whether the procedures utilized by the Department of Public Safety in its discharge of appellant Taylor comported with the due process clauses of our State and Federal Constitutions. (This issue presents the sub-issue of whether W. Va. Code § 15-2-6 and § 15-2-21, which set forth the procedures for such a discharge, are constitutional under the State and Federal Due Process clauses. Appellant has not alleged, nor does it appear, that the appellees violated the provisions of these statutes.)

2. Whether the decision of the Board of Appeals sustaining the discharge, was "clearly wrong in view of the reliable, probative, and substantial evidence on the whole record." W. Va. Code § 29A-5-4 (g) (6).

For the reasons set forth in the letter of November 30, 1984, a copy of which is attached hereto, the Court finds:

A. That the procedures utilized by the Department of Public Safety in its discharge of appellant Taylor afforded him due process of law as mandated by the State and Federal Constitutions. The statutory procedures provided for by W. Va. Code § 15-2-6 and § 15-2-21 did not operate to deny appellant due process of law, and were not unconstitutional as written.

B. The Board of Appeals' decision to sustain the discharge was not clearly wrong in light of the evidence presented to the Board.

Accordingly, it is ORDERED that the decision of the Board of Appeals be affirmed, and that this action be dismissed.

The appellant objects and takes exception to the Court's findings in paragraphs A and B above, and therefore objects and excepts to this order.

Approved for entry this 5th day of February, 1985.

A. Andrew MacQueen
Judge

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
Kanawha County Judicial Building
Charleston, West Virginia 25301
November 30, 1984

Michael S. Francis, Esq.
Attorney at Law
Drawer 68
Maple Ave. & Washington
New Martinsville, W. Va. 26155

Silas Taylor, Esq.
Asst. Attorney General
Capitol Building
Charleston, W. Va. 25305

James McLaughlin, Esq.
Attorney at Law
W. Va. University College of Law
Morgantown, W. Va. 26505

RE: Robert Julian Taylor v. H. F. Mooney, Jr.
AP-CA-80-78

Gentlemen:

For obvious reasons, this note will be as brief and to the point as I can make it. I have carefully reviewed the original hearing record, the stipulated additions, and the detailed memoranda of the parties. In addition, I have conducted independent research in virtually all areas presented by the appeal.

Based upon my review, I am of the opinion that none of the procedural assaults by the appellant to the proceedings below merit reversal. Without reciting all of the predicates for this conclusion, I draw the parties attention to the actions and decisions of the West Virginia Supreme Court of Appeals in the disciplinary proceeding involving Magistrate Kermit W. Pauley. While the final action of the Court is reflected in *IN RE: PAULEY*, _____ W. Va. _____, 318 S.E.2d 418 (1984) various other unrecorded proceedings and unreported Orders are relevent here.

In *Pauley*, the Administrative Director of the Courts, an employee of the West Virginia Supreme Court of Appeals, initiated disciplinary actions by filing a complaint alleging ethical misconduct by Mr. Pauley, a Migistrate ofKanawha County. Shortly thereafter, acting upon unverified documents submitted to the Supreme Court's delegate agency, the Judicial Inquiry Commission, the Court summarily suspended Magistrate Pauley after a brief audience with Pauley but without the opportunity for Pauley to be heard or to present evidence or information. Thereafter, the procedures established under the Rules of Procedure for the handling of complaints against Justices, Judges and Magistrates were followed. During this procedure, a post-suspension hearing was held before the Judicial Review Board. During this hearing, Pauley was afforded substantial due process rights, including a full evedentiary hearing, confrontation by witnesses, the right to counsel, and the right to present a defense by testimony and exhibits. Notably, the Judicial Review Board is composed of three Circuit Judges selected by the Supreme Court of Appeals, one Magistrate also selected by the Supreme Court of Appelas, two members of the West Virginia State Bar and one lay person. Expecting the lay person, by Constitution or Court rule all of these members are subordinates of the Supreme Court of Appeals.

Sixteen months after the original suspension, the Supreme Court of Appeals upheld its own suspension for a limited period of six months. Notably, the sixteen month period between the initial complaint and its final resolution exceeded the period of suspension by an obvious ten months.

The parallels between *Pauley* and the present case are obvious. Not only was there a prehearing suspension without the opportunity to present opposing evidence or information, but the suspension was lengthly and the final hearings and decisions were made by persons in the

"chain of command" and the Supreme Court of Appeals itself, the employer of the complaining party. Thus, based upon this and numerous other comparable precedents, the procedural deficiencies alleged by the appellant are not sustained in the record.

The final issue of consequence raised by the appellant is the question of whether the findings against him were sustained by the evidence. In this respect, it is plain that the Board of Appeals made its findings based upon clearly controverted evidence; particularly the testimony of the appellant and that of one James Otis Grove. A review of the entire record demonstrates that there was more than adequate evidence of a substantial probative nature to sustain the Board's findings. Of special interest is the fact that the Board chose to characterize substantial unlawful donduct as "neglect of duty". This mitigated characterization is nonetheless supported by the record and the reasonable inferences to be drawn from the evidence.

For the reasons articulated, the decision of the Board will be affirmed. Counsel for the appellee should prepare an appropriate Order reflecting this decision and making this letter a part of the record by reference. The objections and exceptions of the appellant should be preserved by that Order.

Sincerely,
A. Andrew MacQueen
Chief Judge

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY
BOARD OF APPEALS
IN RE: THE DISCHARGE OF R. J. TAYLOR FROM THE DEPARTMENT OF PUBLIC SAFETY

Finding of Fact

Upon consideration of the evidence adduced at the administrative Hearings of the foregoing action on the 15th, 16th, 19th and 20th days of March, 1979, the Board finds that the following facts are true:

1. Appellant's name is Robert Julian Taylor, age 41, who resides at 2201 Lincoln Avenue, Parkersburg, West Virginia.

2. Appellant was a member of the Department of Public Safety from April 1, 1962 until his discharge on January 16, 1979.

3. Appellant held the rank of Corporal and was the Detachment Commander of the Paden City Detachment, located in Tyler County, West Virginia, from February 1, 1976 until his date of discharge.

4. The Superintendent of the Department of Public Safety, by Special Order No. 7, dated January 11, 1979, caused an investigation to be made by Lt. R. G. Fink of certain allegations of theft and misconduct by members of the Department of Public Safety in the Tyler County area.

5. After the completion of the investigation, the Superintendent of the Department of Public Safety issued Special Order No. 10, dated January 16, 1979 discharging the appellant as a member of the Department of Public Safety.

6. The appellant was served with the order of discharge and a written statement, setting forth the charges and reasons for the Superintendent's discharge of R. J. Taylor.

7. The order of discharge and the statement of charges and reasons for such discharge were served upon the

appellant by the Superintendent of the Department of Public Safety in the presence of Lt. Colonel H. C. Beverley, Chief of Field Services of the Department of Public Safety.

8. H. F. Mooney, Jr., is the Superintendent of the Department of Public Safety; Lt. Colonel H. C. Beverley is the Chief of Field Services; both were appellant's commanding officers.

9. The Superintendent, upon the timely request of the appellant and by Special Order No. 24, dated January 29, 1979, assigned the members of this Board in compliance with Chapter 15, Article 2, Code of West Virginia.

10. Pursuant to Special Order No. 24, and upon notice to counsel for the appellant and appellee, the Board met on February 1, 1979, to appoint a chairman, select a time and place for hearing and to entertain preliminary motions from counsel.

11. Upon agreement of counsel for both parties, counsel for the appellant met in the presence of the chairman of the Board of Appeals to consider maters appropriate to the conduct of the hearing. Upon agreement of counsel, and upon the motion of counsel for the appellant, the hearing was continued and rescheduled for March 15, 1979, a date suggested as acceptable by counsel for the appellant.

12. Special Order No. 10, and the accompanying letter of January 16, 1979, together with the copy of the internal investigation report, including statement of witnesses, provided sufficient specific reasons for discharge within the meaning of W. Va. Code, 15-2-21.

13. Upon the request of the appellant, First Sergeant V. N. Brackenrich was stricken from the Board for cause and First Sergeant R. P. Smith was selected by lot to replace him and assigned by Special Order No. 24A. The Superintendent, by counsel, waived any right to challenge members of the Board for cause.

14. Upon agreement of counsel, the appeal hearing previously set by the Board of Appeals at the February 1, 1979 meeting was continued from February 20, 1979 to March 15, 1979, in order to provide appellant sufficient time to seek injunctive relief.

15. Both parties waived any objection to the rescheduling of the hearing by the Chairman of the Board of Appeals, in the absence of a quorum of the Board and in opposition to the thirty-day requirement of W. Va. Code, 15-2-6.

16. The action came on to be heard on the 15th, 16th, 19th and 20th days of March 1979 at the West Virginia State Police Academy at Institute, West Virginia. There appeared the appellant, in person, and by Michael S. Francis and David Underwood, his counsel. The Superintendent was represented by Ellen F. Warder, Counsel for the Department of Public Safety. The Board proceeded to hear the testimony of twenty (20) witnesses, including the appellant. Upon consideration of the evidence in this matter, the Board finds the Superintendent of the Department of Public Safety, had just cause to discharge R. J. Taylor.

UNDERLYING EVIDENTIARY FACTS

1. On 3 November 1978, the Chief of Security of Mobay Chemical Corporation reported to the Moundsville Detachment of the Department of Public Safety the theft of four walkie-talkie radios and a battery charger.

2. The theft of the radio equipment was initially investigated by Trooper S. P. Singleton of the Moundsville Detachment of the Department of Public Safety.

3. The property, which was the subject of the Mobay report, was stolen during the period between September 18, 1978 and October 25, 1978.

4. Different portions of the property were stolen from Mobay on three separate occasions between September 18, 1978 and October 25, 1978.

5. The description of the property given the investigating officer included the type and make of the property, the individual serial numbers affixed to each of the radios, and a stamped label with the word "Mobay" and a number affixed to each piece of property.

6. The investigating officer was supplied the name of a suspect, Jerry Lee Fulks, by sources at Mobay.

7. Jerry Lee Fulks was an employee of Mobay who previously had entered a guilty plea to petit larceny, having been charged with grand larceny.

8. Jerry Lee Fulks was a frequent associate of some law enforcement officers in the Paden City area who permitted Fulks to accompany and assist them during the times they were involved in performing police functions.

9. On 3 November 1978, the investigating officer contacted Trooper W. M. Fox, of the appellant's detachment, to assist him in the investigation of the suspect, Jerry Fulks.

10. On 3 November 1978, at 1559 hours, the investigating officer sent a State Message (teletype) to all stations (detachments) in the State, listing the property reported stolen by Mobay, together with a description, including available serial numbers, of the property.

11. The Paden City Detachment of the Department of Public Safety has a teletype machine.

12. The State Message (teletype) was received at the Paden City detachment on 3 November 1978.

13. The State Message (teletype) was verbally broadcast over the Department of Public Safety's communications system from Moundsville on 3 November 1978.

14. The appellant was on duty at Paden City at the time the written transmission was communicated and the message was verbally broadcast, and the Paden City detachment duty log indicates his duty status from 0800 hours until 1800 hours on 3 November 1978.

15. The appellant and Jerry Lee Fulks made at least four visits to the residence of James Otis Grove. On each of these occasions, the appellant transported Fulks to their destination in a vehicle owned by the Department of Public Safety.

16. The appellant admits that he and Fulks were at Grove's residence in late August or perhaps the first few days of September. Grove testified that the first of a series of visits regarding the alternation, modification and repair of certain radio equipment began about this time.

17. During this visit, Grove was asked by Fulks to modify the frequency of a Motoroal H. T. 220, UHF walkie-talkie radio, carrying a Mobay Chemical Corporation label visible to anyone who handled the radio, from its existing frequency to a frequency common to the Department of Public Safety or the Department of Natural Resources. In a conversation between Fulks and Grove, Grove mentioned to Fulks that the radio was valued between $800 to $1200 and would amount to grand larcency if it were stolen. Grove described to Fulks the type of radio which would be required to accomplish his purpose.

18. The appellant was present in the room during the transaction between Fulks and Grove. The appellant did not handle the radio.

19. On a second and subsequent occasion, the appellant and Jerry Lee Fulks brought at least two radios to James Otis Grove. These two radios were Motorola, H. T. 220, VHF, walkie-talkie radios of the same type and description as those stolen from Mobay Chemical. These radios bore serial numbers, colored unit number tags but no labels indicating that the radios belonged to Mobay. These radios could not be converted to the Department of Public Safety or the Department of Natural Resources frequency. Grove was then asked to modify the radios to a frequency which was not in use in the area for the purpose

of having communications between the DPS and DNR cars. Grove agreed to make the modification for a price of $50. The appellant was present in the room during the transaction between Fulks and Grove.

20. The date of this second visit to Grove falls during the period in time (September 18, 1978 to October 25, 1978) that four radios of the same type and description were taken from Mobay Chemical Corporation.

21. Approximately four weeks later, the appellant and Jerry Lee Fulks returned to the Grove residence to pick up the radios which Grove had modified to a new frequency. The radios were tested by having the appellant drive his vehicle, with Fulks as a passenger, some distance from the Grove residence while Fulks and Grove communicated with each other with the use of the two radios.

22. In mid-November, within the week before deer season which commenced November 20, 1978, shortly prior to deer season, the two walkie-talkie radios were in use at Shiloh, Wetzel County, West Virginia. On that occasion the appellant was present. He had been working with Fulks in a department vehicle. Fulks was using the radios to communicate with a conservation officer who was riding in a vehicle owned by the Department of Natural Resources.

23. The appellant and Jerry Lee Fulks visited the residence of James Otis Grove, shortly after the Shiloh incident and brought the two walkie-talkies, which Grove had previously modified and a UHF battery charger. Fulks complained that a DNR officer was angry because the radios didn't work properly and requested that Grove modify the UHF charger to fit the VHF radios. When Grove informed Fulks that the charger was not capable of being modified for that purpose, the appellant said, "Fulks, you ignorant son of a bitch, you stole the wrong mother fuckin battery charger".

24. James Otis Grove sold the initial UHF radio, marked

with the Mobay label, to a law enforcement officer, who attended a radio amateur convention in Gaithersburg, Maryland on October 8, 1978. When the appellant learned of this he told Grove that if the radio was ever found, every one of them could be in trouble.

25. Four Motorola, H.T. 220, VHF, walkie-talkie radios and two battery chargers were recovered from Jerry Lee Fulks by Lieutenant R. G. Fink during the investigation. Two of the recovered radios carried serial numbers identical to the radios reported stolen by Mobay Chemical Company. The other two recovered radios, which bore no serial numbers, were identified by James Otis Grove as the radios brought to him by Fulks and the appellant and which he modified to a different frequency. Grove also identified the two battery chargers recovered by Fink as the battery chargers he worked on at the request of Fulks, one of which was the charger brought to him by the appellant and Fulks. Fulks admitted to Lieutenant R. G. Fink during his investigation that the four radios and the two battery chargers were taken from Mobay Chemical Corporation.

CONCLUSIONS OF LAW

The evidence taken during this hearing centered upon five (5) walkie-talkie radios and two (2) battery chargers which were alleged to have been stolen from Mobay Chemical Corporation. Of the five (5) radios and two (2) battery chargers which were the subject of testimony, three (3) radios and one (1) battery charger were directly linked to the appellant in part by his own testimony and by the testimony of James Otis Grove. Grove testified that the first radio (UHF) he was asked to adapt was marked with a Mobay Chemical Corporation label and that the second two (2) radios bore unit number tags and serial numbers when they were presented to him by Fulks in the presence of the appellant. Grove identified the two (2)

radios and one (1) battery charger by his own workmanship as the ones he had worked on for Fulks. These two (2) radios and the one (1) battery charger that were identified by Grove were recovered by Lieutenant R. G. Fink from Jerry Fulks along with two other radios, which bore the same serial numbers as the radios taken from Mobay; and a second battery charger. The four radios and the two battery chargers recovered from Fulks were of the same type and description as those stolen from Mobay. Fulks admitted to Lieutenant Fink that he had taken the radios. There was, therefore, sufficient evidence to establish that the property which Fulks brought to Grove in Taylor's presence was stolen.

The appellant acknowledged that the radios he saw in Fulk's possession were valuable pieces of equipment. He admitted that they were in Fulks' possession on at least two occasions when he transported Fulks to the Grove residence. The appellant also admitted that he made no inquiries of Fulks about the radios, their value, their origin or their intended use "because I (Taylor) know Mr. Fulks." The appellent admitted that he knew Fulks had a prior criminal record with a conviction of petit larceny. The appellant admitted that at least on three occasions he was present when Fulks had the radios in his possession or in use.

The Board is of the opinion that the charge of neglect of duty is sustained by the evidence. The appellant failed to exercise the degree of curiosity which would be reasonably expected of a police officer of seventeen years experience; he failed to inquire further of Fulks or to pursue in any manner the possible origins of the radios which he admits he saw on three different occasions; he pursued no independent investigation of the matter and he justified his lack of action on the ground that he knew Jerry Fulks. The testimony of the appellant's own witnesses characterized Fulk's as "an habitual liar and a habitual thief."

Although the Board finds that the appellant knew that these radios were stolen, such finding is not necessary in the opinion of the board to sustain the charge of neglect of duty.

The evidence sufficiently establishes that the appellant knew the property was stolen and failed to take appropriate police action. There was a conflict in the evidence between the testimony of James Otis Grove and the apellant. The Board, being present and capable of observing the demeanor of the witnesses during extensive questioning, found James Otis Grove to be a credible witness. His testimony regarding the late September visit by Fulks and the appellant was corroborated by the unequivocal testimony of Sheriff Leland Mason. Although repeatedly asked by counsel on cross-examination whether he was at the Grove residence in September, the appellant denied that he had made such a visit. The rebuttal testimony of Sherriff Mason, however, established that he had talked with the appellant on September 26th and had been told that the appellant and Fulks were going to Grove to get a radio repaired. Grove testified at considerable personal risk to himself and was candid about his knowledge and his own actions independent of the appellant and Fulks.

The basis of the conclusion that the appellant knew of the stolen character of the property are the statements made by the appellant in Grove's presence - i.e., that Fulks had stolen the wrong battery charger and that everyone could get in trouble if the radio Grove sold to the Maryland policeman was traced. Having direct knowledge of the stolen character of the property, the actions of the appellant provide more than a sufficient basis upon which to conclude the discharge of the appellant was for cause.

Therefore, based on the foregoing findings of fact and conclusions of law, it is the determination of this Board

that the Superintendent's order discharging the appellant be sustained.

April 14, 1980
Captain D. L. Lemmon
Lieutenant J. T. Gribben
Master Sergeant J. P. Fulks
First Sergeant R.P. Smith
Sergeant R.L. Rauer
Trooper First Class H. E. Dailey
Trooper Marty Allen

IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS

ROBERT JULIAN TAYLOR

vs.

H. F. MOONEY. etc. et al.

NOTICE OF APPEAL

You are given notice that Robert Julian Taylor will appeal your order of November 6, 1985, refusing his appeal from a judgement with the Circuit Court of Kanawha County to the Supreme Court of the United States under 28 U.S.C. S1257(2).

James A. McLaughlin
Of Counsel for Appellant

PROOF OF SERVICE

On January 31, 1986, James A. McLaughlin, of counsel for Julian Taylor, did personally serve a copy of the attached Notice of Appeal on the Supreme Court of Appeals of West Virginia by leaving a copy at the office of the Clerk, George Singletary. I also did serve a copy of said Notice on the Attorney General of West Virginia by leaving a copy at his office in the Capitol. Attention: Silas Taylor, Assistant Attorney General.

James A. McLaughlin
Attorney at Law

A copy of the Notice of Appeal was also served on the Kanawha County Circuit Court on January 31, 1986, but hand delivery to the clerk of that court in the courthouse in Charleston, W. Va.

James A. McLaughlin
Attorney at Law

FROM THE WEST VIRGINIA CODE OF 1931 AS AMENDED.
§ 15-2-6. DEPARTMENTAL APPEALS BOARD; APPEAL PROCEDURES.

Appeals of transfers, suspensions, demotions in rank and discharges shall be heard by boards of appeals convened pursuant to the provisions of this section. The boards shall each consist of seven members and five members shall constitute a quorum. A new board shall be convened to hear and determine each new appeal filed by a member of the department. There may be more than one board in existence at the same time meeting on different appeals. A member of the retirement board is eligible to serve on an appeals board.

The members of a board shall be one member of the department who is of the rank of trooper and six members of the department who are of one of each of the six consecutive ranks above trooper, all of whom shall be chosen by lot by the superintendent with each member to be so chosen from among all the members of each of the seven ranks. No department member may serve on an appeals board if he is a member of the same detachment as the member making the appeal. Within ten days after he has been notified of his selection and assignment to serve on a board, a member may for cause request to be relieved of such assignment. The superintendent shall determine whether the reasons alleged by the member are sufficient cause to relieve the member of such assignment. If such request is granted by the superintendent, a new board member shall be selected by lot from the same rank to replace the member who has been relieved of such assignment.

A chairman shall be selected by the members of the board. Each member of a board shall be reimbursed for all reasonable and necessary expenses actually incurred in attending meetings of a board. All expenses of a board

shall be paid from appropriations to the department.

Within fifteen days after a member of the department has received a notice of transfer or a statement of charges and an order of suspension, demotion in rank or discharge by the superintendent, he may appeal the transfer or order to an appeals board by filing a written notice of appeal with the superintendent. The superintendent shall promptly record and file each appeal, select a board, notify each new board member of his selection, and furnish to each board member a copy of the notice or order appealed from and the notice of appeal. A hearing by a board of appeals shall be held within thirty days after the superintendent has received a member's notice of appeal. At least fifteen days prior to the hearing date, the board shall notify the superintendent and the member making the appeal of the date, time and place of the hearing.

Any member of the department who makes such an appeal, as aforesaid, may be represented by an attorney or by any member of the department or retired member who is receiving benefits from the death, disability and retirement fund. The superintendent may be represented by counsel of his choice. In the appeal of a transfer, the superintendent has the burden of proof that the transfer if for the purpose of the operational needs of the department. In any other appeal the superintendent has the burden of proof as to the charges alleged. The procedure in any hearing before the board shall be informal and without adherence to the technical rules of evidence required in proceedings in courts of record. All evidence submitted to the board shall be submitted under oath. The chairman, or any member of the board, shall have authority to administer oaths to witnesses, subpoena witnesses and compel the production of books and papers pertinent to any appeal or hearing authorized by this section.

If any person subpoenaed to appear at any appeal or hearing shall refuse to appear, or shall refuse to answer inquiries propounded at the appeal or hearing or shall fail or refuse to produce books and papers which have been subpoenaed which are pertinent to any appeal or hearing authorized by this section, the board shall report the facts to the circuit court of Kanawha County or the circuit court of any county in which the hearing is being conducted and such court may compel obedience to the subpoena as though such subpoena had been issued by such court in the first instance. A person giving testimony at an appeal or hearing authorized by this section shall not be liable for such testimony given in good faith and without malicious intent.

The board shall designate a reporter for any such hearing who shall record and transcribe all of the proceedings. Upon his demand, the member making the appeal shall have a public hearing on the charges and in the absence of such demand, the board may determine whether or not the hearing should be public. Any hearing may be continued, recessed or adjourned by the board.

The superintendent shall provide reasonable space for the conduct of hearings. The charges of the reporter shall be paid by the superintendent from available appropriations. At the conclusion of the hearing, the board shall determine whether or not the superintendent's order shall be sustained. The board's decision shall be issued in writting, with copies thereof being sent by the board to the superintendent and to the appealing member by certified mail, return receipt requested. A hearing shall be conducted by at least five members of the board and the decision of the board shall be made by a majority vote of all the members of the board.

Either party aggrieved by a decision of a board of appeals may appeal the decision to the circuit court of Kanawha County within sixty days of receipt of a copy of the board's decision.

The court shall hear the appeal upon the record and determine all questions submitted to it on appeal.

In the event any decision sustaining the superintendent's order or notice is reversed upon judicial review, which reversal is final, the superintendent shall return the member to his status prior to the superintendent's order or notice without any acts or action of reprisal or reprimand, with full payment of any compensation withheld and with full credit for service between the date the superintendent issued his order or notice and the date of the final judicial decision reversing the decision of the board. (1919, Ex. Sess., c. 12, § 23; Code 1923, c. 19, § 23; 1972, Ex. Sess., c. 3; 1977, c. 149; 1979, c. 97; 1984, c. 157.)

Submitted by:

Brennan and Francis
Attorneys at Law
P. O. Drawer 68
New Martinsville, WV 26155

James A. McLaughlin
and
Thomas C. Cady
Attorneys at Law
Morgantown, WV

Of counsel to Appellant.

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1344

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT JULIAN TAYLOR

Appellant,

v.

H. F. MOONEY, JR., as Superintendent of the West Virginia Department of Public Safety, and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor

Appellees.

ON APPEAL FROM THE
WEST VIRGINIA SUPREME COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

CHARLES G. BROWN
Attorney General

SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record

State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 348-2021

COUNSEL FOR APPELLEES

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STATEMENT OF THE CASE

A. Pertinent Facts Omitted by Appellant

Superintendent Mooney, as chief executive officer of the West Virginia State Police, was under a statutory duty to investigate alleged misconduct of state policemen. W. Va. Code § 15-2-21. Accordingly, upon receiving apparently reliable information that appellant may have been involved in the theft of four hand-held two-way radios, he ordered such an investigation on January 16, 1979. (Appellee's Exhibit No. 1, Tr. 62-63, 152-154) Lt. Fink was the investigating officer and a friend of appellant. He testified that he was initially biased in favor of appellant, Corporal Taylor. (Tr. 304- 305, 371, 442-443)

In the course of his four-day investigation, Lt. Fink learned that Corporal Taylor had, on several occasions, accompanied one Jerry Lee Fulks to a radio-technician's home where, in Corporal Taylor's presence, Fulks had sought to have the stolen radios modified to operate on law-enforcement frequencies. (Tr. 201-233) The radio technician told Lt. Fink that Corporal Taylor had made remarks which unequivocally demonstrated that Taylor knew the radios were stolen. (Tr. 204, 213-215) Taylor was at that time Commander of the Paden City detachment of the State police, which had participated in the investigation of the theft. (Tr. 142, 149-150, 478) (At the evidentiary hearing before the Board of Appeals, appellant denied any knowledge that the radios were stolen, and denied knowing

about the theft or the investigation thereof. The Appeals Board later found these denials to be incredulous.)

In the course of his investigation of Taylor's alleged involvement, Lt. Fink encountered appellant three times. During one such encounter, Lt. Fink advised appellant "essentially who had given statements implicating him and briefly what those statements alleged." (Tr. 374-375, 606-610) During the last encounter, Lt. Fink "outlined to Corporal Taylor the seriousness, in my judgment, of the situation he was in," and told him "the content of the investigation and the evidence." However, Lt. Fink did not accede to appellant's request to see the written statements of the witnesses Fink had interviewed. (Tr. 348-349) (The entire investigation report, including the statements, was

later furnished to appellant prior to his hearing before the Board of Appeals.) Lt. Fink did not interrogate Taylor, nor did Taylor volunteer any information other than to comment that he did not know what Lt. Fink was talking about. (Tr. 374-375, 606-610)

On January 15, 1979, Lt. Fink advised Corporal Taylor to report to Superintendent Mooney the following day. Taylor did so, accompanied by his attorney, whereupon the charges and the investigation were discussed "for a number of hours." (Tr. 87) At that meeting, Superintendent Mooney decided that he "had good and sufficient reasons under the General Orders of the Department to dismiss the Corporal * * *." (Tr. 65-66) Taylor then declined an option to resign, and was handed previously prepared documents effecting

his discharge and explaining the reasons therefor. (App. E; Appellee's Exhibit Nos. 2 and 3; Appellant's Ex. No. 1; Tr. 66-76) Appellant did not challenge the sufficiency of these documents during the judicial review process.

B. Appellant's Misstatements Of Fact

In his "Question Presented," appellant states that Superintendent Mooney took an "active adversary role as a party against his discharged employee." The challenged statute (W. Va. Code § 15-2-6) refers to the superintendent as a party and the proceedings were so styled, but the Superintendent did not sit at counsel table or otherwise assume the role of a party. He appeared as a witness to explain the discharge procedure (as did others), but otherwise did not function as the "accuser" or

"prosecutor," thus diminishing the impact of appellant's "command influence" theory. The Superintendent was the executive head of the agency, and thus had the sole responsibility to determine what action to take upon learning of the allegations against appellant. As executive head of the agency, he was a proforma party to all the proceedings to date, in his official capacity.

In an apparent effort to make the state's judicial review procedures appear unfair, appellant's current counsel represents that no oral argument was allowed in the Kanawha County Circuit Court nor was new evidence introduced. Both assertions are mistaken. Oral argument was rejected by the parties, and stipulated evidence was introduced.

Appellant repeatedly asserts that he was denied a pre-discharge opportunity to respond. Though the record of his pre-discharge encounters with Lt. Fink and Superintendent Mooney is limited, it is apparent that appellant and his attorney elected not to respond in depth to the charges unless first given copies of the written statements secured by Lt. Fink. It has never been alleged that appellant's pre-discharge knowledge of the charges was inadequate to afford him a basis on which to respond, nor has there ever been any attempt to show that he was prevented from responding. Appellant complained below that Lt. Fink did not interrogate appellant, but there was no allegation or evidence that appellant was prevented from volunteering information. Appellant did volunteer to Lt. Fink, prior to

discharge that he "didn't know what you [Fink] are talking about." (Tr. 374-375)

Testimony regarding the pre-discharge conference with Superintendent Mooney does not disclose any attempt by appellant to present his side of the story, nor does it indicate he was prevented from doing so other than by his election not to do so without first seeing the written statements. (Because there was a pending criminal investigation of the theft of the radios, and because appellant appeared to be an accessory after-the-fact, disclosure of the statements might have compromised the state's ability to prosecute.)

Appellees vehemently deny that appellant was not permitted to urge the superintendent to invoke a lesser sanction than discharge. Though the

record is barren on this point, counsel is informed that much of the pre-discharge conference with the Superintendent was consumed by exactly such pleas, articulated by appellant's attorney. Under state law, it was appellant's burden to make a record sufficient to demonstrate error. Delong v. Kermit Lumber Co., 332 S.E.2d 256, 259 (W. Va. 1985). Having failed to do so, he cannot now rely on the absence of a record on this point.

HOW THE ISSUES WERE RAISED BELOW

Appellees concede that arguments b and c of the Jurisdictional Statement, alleging "inherent bias" in the Appeals Board procedure, were raised in the pleadings below as due process attacks on W. Va. Code § 15-2-6. (App. A; App. B, pp. 6-7, 11-13; App. D. pp. 5-6)

However, no evidence was introduced at any stage to demonstrate actual bias or prejudice on the part of any member of the Appeals Board, nor was there any attempt to show actual "command influence."

Argument "a," alleging the failure to afford a pre-discharge opportunity to respond, has never until now been articulated as an attack on the statute. Rather, appellant attacked the pre-discharge conduct of Lt. Fink and Superintendent Mooney, alleging that both were under a duty to (1) disclose the written statements, and (2) afford appellant a pre-discharge opportunity to respond to the statements. (App. B, pp. 3-6, 9-10; App. C, pp. 4, 6; App. D, pp. 2-4, 7-9) (General Order No. 10, an internal regulation, required disclosure of Lt. Fink's investigation. App. E,

App. Ex. No. 4) The pre-discharge procedures regarding dismissals are articulated in W. Va. Code § 15-2-21, which have never (even now) been substantially attacked by appellant.

No findings-of-fact have been rendered by any tribunal at any level regarding appellant's pre-discharge opportunity to respond. At the first level of judicial review, appellant was entitled to introduce new evidence to demonstrate that he was effectively denied a pre-discharge opportunity to respond. W. Va. Code § 29A-5-4. However, he elected not to.

ADDITIONAL PERTINENT STATUTES

> "§15-2-21. Suspension, demotion or discharge of members; right of appeal.
>
> "The superintendent may suspend, demote in rank or discharge from the service any member of the department of

public safety for any of the following causes: Refusing to obey the lawful orders of his superior officer, neglect of duty, drunkenness, immorality, inefficiency, abuse of his authority, interference with the lawful right of any person, participation in political activities, primaries, conventions or elections, conviction for a crime or any action proscribed under this article. The superintendent shall cause an investigation to be made when notice of any one or more of such causes is brought to his attention and shall determine whether or not the member should be suspended, demoted in rank or discharged. If the superintendent orders the member suspended, demoted in rank or discharged, a written statement of the charges and a written order of suspension, demotion in rank or discharge shall be delivered personally to the member by his commanding officer, or next in command in the absence of his commanding officer. The superintendent shall explicitly set forth in any such written statement of charges the details giving rise to the discharge. The member may appeal the superintendent's order to the board of appeals created for such purpose or to

the circuit court of Kanawha county in accordance with the provisions of section six [§ 15-2-6] of this article and all of the original papers in such cases shall be delivered to the appeals board or the circuit court, as the case may be.

"The right to appeal a suspension or discharge shall not apply to members until they have completed their probationary period with the department, which shall be for a period of eighteen months."

ARGUMENT

I.

THE FAILURE OF W. VA. CODE §15-2-6 TO MANDATE A PRE-DISCHARGE OPPORTUNITY TO RESPOND IS NOT FAIRLY BEFORE THIS COURT, DID NOT INJURE APPELLANT, AND RAISES AN INSUBSTANTIAL ISSUE.

A. Appellant Has Never Until Now Attacked The Statute on This Ground.

As articulated at pages 7 to 11 herein, appellant's attack on W. Va.

Code § 15-2-6 has, until now, been predicated on the alleged impartiality of the Appeals Board procedure. To be fair, it must be conceded that appellant has always asserted that due process required the Department of Public Safety to afford a pre-discharge opportunity to respond. However, it has never been asserted that any statute played a role in the alleged denial of this right. (Appendices A, B, C, and D are representative of appellant's attacks.) In order to be considered on appeal by this Court, the ground raised here as an attack on the statute must have been raised below. Lerner v. Casey, 357 U.S. 468 (1958); Coleman v. Miller, 307 U.S. 433 (1939). Thus, this Court has no jurisdiction of this issue under 28

U.S.C. § 1257(2). Though this Court has discretionary jurisdiction to hear this issue by treating the appeal as a certiorari proceeding, it should not do so for the reasons hereafter set forth.

B. The Statute, in That it Does Not Prohibit a Pre-Discharge Opportunity to Respond, Can Be Construed as Consistent With Due Process.

This Court presumes that state courts will construe a statute so as to uphold its constitutional validity. Douglas v. New York, N.H. and H.R. Co., 279 U.S. 377 (1929). In view of the fact that appellant received ample opportunity to respond prior to discharge, it is not at all clear that the lower court's ambiguous decision was premised on the failure of the statute to expressly mandate such an opportunity. (App. A to the Petition, page A-2)

C. The Record Below Requires the Conclusion that Appellant Received a Fair Opportunity to Respond Prior to Discharge.

The testimony regarding appellant's pre-discharge encounters with Lt. Fink and Superintendent Mooney was not well-developed. As summarized in the Statement of the Case, part A, herein, appellant met with the investigating officer three times and with the Superintendent once prior to discharge. The evidence against him was orally summarized for Taylor by Lt. Fink. Though the record does not reveal how much detail was given, the burden to make an adequate record rests on the appellant. Delong v. Kermit Lumber Co., 332 S.E.2d 256, 259 (W. Va. 1985). No evidence was offered which would show appellant to have been prohibited from volunteering a

defense to either Lt. Fink or the Superintendent.

Due to the futility of attacking administrative procedure before the body that employs them, W. Va. Code § 29A-5-4 provided appellant the opportunity to fully develop an evidentiary record on this issue before the Circuit Court of Kanawha County. He elected not to. (Appellees, by contrast, reserved the right to do so should the circuit court have found the existing record inadequate.)

D. This Issue is Inappropriate for Certiorari Jurisdiction.

There has been insufficient time for lower appellate courts to develop conflicting opinions regarding the applicability of Cleveland Board of Educ. v. Loudermill, ___ U.S. ___, ___

S. Ct. ___, 84 L. Ed. 2d 494 (1985), to police discharges. During the period between Arnett v. Kennedy, 416 U.S. 134 (1974) (this Court's last articulable standards regarding due process in public employment) and Cleveland, supra, appellate courts uniformly upheld discharges of permanent police officers in the face of due process attacks based on the unavailability of a pre-discharge opportunity to respond. Economico v. Village of Pelham, 50 N.Y.2d 120, 405 N.E.2d 694 (1980); Grant v. Police Commissioner of Boston, 387 N.E.2d 178 (Mass. 1979); Nicoletta v. North Jersey District Water Supply Commission, 390 A.2d 90 (N.J. 1978); City of New Brunswick v. Speights, 157 N. J. Super. 9, 384 A.2d 225 (1978); Gorham v. City of Kansas City, 225 Kan. 369, 590 P.2d 1051 (1979); Orr v. Civil Service Board

of City of Portland, 30 Or. App. 739, 567 P.2d 1076 (1977); Hoyt v. Police Commissioner of Baltimore City, 279 Md. 74, 367 A.2d 924 (1977).

The policy of these decisions, as applicable now as then, is that the public interest in expeditious removal of untrustworthy police officers, who wield the power of the state in its most volatile form, outweighed the individual's interest in cumbersome pre-discharge procedural rights.

This policy rationale may have to be reassessed in light of Cleveland, but such reassment should be permitted to develop in the lower courts, and in cases where the parties were cognizant of the significance of Cleveland throughout the proceedings. The record as it exists in this case is adequate to conclude that, had appellant wanted to

explain himself prior to discharge, h could have. No injustice will b wrought by refusing to hear his case.

II.

APPELLANT'S ASSERTION THAT THE APPEAL BOARD WAS "INHERENTLY BIASED" RAISES NO SUBSTANTIAL FEDERAL ISSUE.

Appellant contends that the boar of appeals was not an impartia tribunal. In support of this contentio he raises two areas of alleged "biasin influence": (1) Command Influence[1] an (2) pecuniary interest. Appellant

---

[1] Appellant also characterizes "Comman Influence" as "judging one's own case. The two "biasing influences" are, i reality, one, since appellant argue that the adjudicative officers were th employees of the superintendent and tha this "makes it worse." Jurisdictiona Statement at 8-9.

insists that he is not alleging an impermissible combination of investigative and adjudicative functions. This is in apparent recognition of the lack of force such an argument would have before this Court. However, his arguments are, in fact, largely based on exactly such considerations.

The Supreme Court of the United States has several times upheld administrative procedures whereby property and liberty interests are adjudicated by the same body, and even the same persons, who investigated and brought the charges. Hortonville Joint School District v. Hortonville Educational Asso., 426 U.S. 482 (1976) (6-2 decision upholding the discharge of tenured public teachers when the post-discharge evidentiary hearing was held before the same school board that originally

discharged them); Withrow v. Larkin, 421 U.S. 35 (1975) (unanimous decision upholding a state statute creating a medical examining board that initiated, investigated, and served as tribunal in, license revocation proceedings); Richardson v. Perales, 402 U.S. 389 (1971) (upheld a system in which a social security examiner both developed facts and then made the disability decisions); Federal Trade Com. v. Cement Institute, 333 U.S. 683 (1948) (commission investigated the party defendants, testified before Congress that their pricing system was illegal, and subsequently served as the tribunal adjudicating the legality of the pricing system).

Thus, the fact that the Appeals Board consisted of members of the same department as others who initiated and

investigated the charges clearly does not disqualify them from hearing the issues. Indeed, one of their own member's future in the Department depended on their decision. They could not help but be mindful of the fact that one of them might someday be in Taylor's position before a similar board.

Appellant relies on decisions dealing with the personal interest of judges in the outcome of judicial proceedings. These cases are distinguishable due to the direct interests the judges had in the outcome, but they are totally inapposite because administrative due process is not judged by the same standards as judicial proceedings.

> "[P]rocedural due process in the administrative setting does not always require application of the judicial model. * * *" Dixon v. Love, 431 U.S. 105 (1977).

> "[A] separation of the prosecutorial and judicial functions is required in a court case but not in an administrative proceeding, Withrow v. Larkin, 421 U.S. 35 (1974). * * *" Main Road v. Aytch, 565 F.2d 54, 58 (3rd Cir. 1977).

Assuming that the judicial mode did apply, the alleged interest of th Board members in upholding thei superior's decision does not equate wit the direct personal interests creatin the impartial tribunals in Tumey v Ohio, 273 U.S. 510 (1927); Ward v Village of Monroeville, 409 U.S. 5 (1972), and Gibson v. Berryhill, 41 U.S. 564 (1973). (In the Hortonvill Joint School District, supra, 426 U. S at 491-493, the Court was not persuade that the personal stake of school boar members reviewing their own investiga tion and prior decision was comparable

to that in Tumey and the other cited cases.)

In this case the personal stake of the members of the board of appeals as alleged by appellant, is speculative and insubstantial. Appellant argues that the board members would uphold the superintendent's decision so that he would not fire them or would give them promotions. No evidence whatsoever was introduced at any level in state court to support this contention. This argument further ignores many safeguards in the system. Statutory and administrative safeguards may save an otherwise allegedly biased administrative procedure. Marshall v. Terrico, Inc., 446 U.S. 238 (1980).

The members of the board are chosen by lot and are of varying ranks. In addition. "no department member may

serve on an appeals board if he is a member of the same detachment as the member making the appeal." W. Va. Code § 15-2-6. Thus, initially, each board should be devoid of bias for or against either party. Nothing in the procedure requires the individual members of the appeals board to inform the superintendent of their votes on the appeal. Since the decision of the board is reached by majority vote, the superintendent need not know whether a particular member had voted to uphold or overrule the initial decision.

Moreover, with the exception of probationary employees, members of the Department of Public Safety can be removed only for cause, and have rights in their permanent rank. W. Va. Code § 15-2-4, W. Va. Code § 15-2-5; W. Va. Code § 15-2-6; W. Va. Code § 15-2-21.

Furthermore, suitability for promotion is established by a "promotion evaluation board." W. Va. Code § 15-2-9. Thus, the superintendent could not effectively act against an appeals board member out of mere displeasure over the result of the appeal. In light of the safeguards, the alleged "financial" concern of the members of the appeals board is contrived.

Finally, we must start from the presumption that the hearing officers are unbiased. Schweiker v. McClure, 456 U.S. 188, 195 (1982). A court cannot rely on generalized assumptions of possible interests placing special weight on the various connections of the hearing officers. Id. at 196. As pointed out by this Court in Schweiker, such connections would only be relevant if those under whom the officers are

connected, in this case the superintendent, themselves have a personal (as opposed to official) interest in the outcome. Id. Nothing in the record indicated that the superintendent was influenced by any personal bias or financial interest or that there was any connection between the appeals board's decision and the personal interests of the board members.

Appellant's contention that the members of the appeals board were the subjects of "Command Influence" is merely a restatement of petitioner's prior arguments, and should similarly fail. Again, no evidence was developed below to show actual command influence. While command influence is of some concern in judicial courts-martial proceedings, "procedural due process in the administrative setting does not

always require application of the judicial model." Dixon v. Love, 431 U.S. 105 (1977).

"Command influence" is a serious consideration in military criminal courts-martial, yet even in that setting, this Court has declined to interfere with composition of the tribunal:

> "Although the opinion in O'Callahan was not uncritical of the military system of justice, and stressed possible command influence and the lack of certain procedural safeguards, 395US, at 263-266, 23 L Ed 2d 291, the decision there, as has been pointed out above, certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process. Indeed, our subsequent ruling in Relford itself indicates our conclusion that military criminal proceedings are not basically unfair, for Relford clearly approves prosecution in a military court, of what is otherwise a civilian crime, when factors are present that

> establish the offense's 'service connection.'" Gosa v. Mayden, 413 U.S. 665, 680-681 (1973). See also, Reid v. Covert, 354 U.S. 1 (1957).

In administrative settings, appellate courts have uniformily rejected due process attacks based on the same type of command influence alleged here. In Main Road v. Aytch, 565 F.2d 54 (3rd Cit. 1977), the decisions of the Superintendent of Prisons were reviewed by a board consisting entirely of the director's subordinates. After acknowledging that the procedure "might have been better if the board had been constituted differently," the court went on to say:

> "Nevertheless, we cannot say that the composition of the special board inherently violates due process. What process is due depends upon the forum in which it is administered and the underlying circumstances.

Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). What is unacceptable in a judicial setting may be tolerable in an administrative proceeding. * * *" Main Road v. Aytch, supra, 565 F.2d at 58.

Similar "command influence" was held not to violate due process in Jenkins v. Louisiana State Board of Education, 506 F.2d 992 (5th Cir. 1975):

> "We realize that the Board at the first hearing in this case made more than an initial investigation, actually imposing suspensions on appellants. We are also aware that the members of the Board were appointed by President Jones, one of the main witnesses against the students.
>
> "We are asked to infer that because the Board had already had one hearing and because its members were appointed by the college president (who had also employed many of them), the members must have been partial to the college's position. We have not been shown any evidence of bias or prejudice of the board members, and our own examination of the record

has not uncovered any. * * *"
(Emphasis added.)

The suspension was upheld.

The highest courts of at least three states have squarely held that police hearing boards, composed entirely of subordinates of the commanding officers whose disciplinary actions they reviewed, complied with the due process requirement of impartiality. Gorham v. City of Kansas City, 225 Kan. 369, 590 P.2d 1051 (1979); Hoyt v. Police Commissioner of Baltimore City, 279 Md. 74, 367 A.2d 924 (1977); and Kelly v. Sterr, 62 N.J. 105, 299 A.2d 390 (1973) cert. denied, 414 U.S. 822 (1974).

Police hearing boards are not held to the same standards as civilian or military criminal courts. Moreover, in this case, appellant has not shown a factual basis for his claims. The mere

fact that the board members were subordinates of the superintendent is insufficient to state a claim, particularly in light of their statutory right to keep their permanent ranks. Appellant has never attempted to demonstrate that any actual force was exerted upon the appeals board, nor has he ever alleged or demonstrated that its members acted in fear of the superintendent.

There are important policy reasons for permitting the Department of Public Safety to make its own personnel decisions. Police officers are an unusually powerful class of employees. Vested with the State's police power, their behavior is subject to high ethical and moral standards designed to insure fair and impartial deployment of their authority. Additionally, as important witnesses in most criminal proceedings,

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their on-duty and off-duty reputations for credibility, integrity, and law abidance are important to their effectiveness. Their training and experience make them uniquely aware of the necessity and feasibility of meeting these standards, and uniquely aware of the classes of behavior inappropriate to a police officer.

A hearing board composed of civilians would be unable to properly judge the severity of the charges in light of these standards. Conversely, they would be unable to properly judge excusable behavior engaged in under exigent or unusual circumstances.

Lastly, they are best able to judge the fairness and credibility of a pre-discharge investigation and the officer's assertions in his own defense.

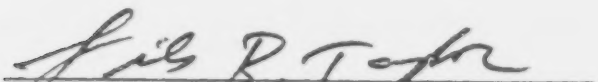
For these reasons, the Department is exempt from the State Civil Service System. For these reasons, administrative expertise within the Department deserves deference. For these reasons, the Appeals Board is constituted fairly.

CONCLUSION

The issue of appellant's pre-discharge opportunity to respond is not appropriate for this Court's appellate jurisdiction, and was inadequately developed below to justify certiorari. The alleged impartiality of the Appeals Board arises from circumstances which this Court and other courts have uniformly held to be consistent with due process, and thus, raises no substantial federal question.

Respectfully submitted,

CHARLES G. BROWN
ATTORNEY GENERAL



SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304)348-2021

Counsel for Appellees.

APPENDIX A

(Excerpts from pages 34-38 of the transcript of proceedings before the Appeals Board)

I want it understood that I have an obligation to raise objections on behalf of my client harkening to one of the questions I would have asked you, I would want you to understand that my role is that of an advocate. I mean nothing personal in anything I say in connection with the raising and offering of these motions. It is, nevertheless, my responsibility and I hope you will understand that.

I object to this hearing that has been scheduled to commence today for the reason that I think it is violative of the due process guarantees of State and Federal Constitutions and that it represents in my judgment an abuse of

discretion in failing to grant a continuance.

* * *

Finally, it is my position that the statute which gives you power which gave birth to this Board is void ad nauseam, void on its fact and I object to this hearing for that reason and more specifically for the following reasons:

There is no provision in Chapter 15, Article 2, Section 6 for suitable discovery in lieu of the Administrative Procedures Act. I invite your attention to it, read it if you will. There is no suitable discovery in lieu of the Administrative Procedures Act. I am denied those things that I have just mentioned to you and accordingly the interest of my client, Mr. Taylor, is prejudiced.

Secondly, I shall not use the term "handpicked" because it so offends. I shall say to you that 15-2-6 gives the Superintendent, who is my client's adversary in this proceeding, the power to select by whatever means, by lot, whatever. In this case by lot, but it gives our adversary the power to select the men who will sit in judgment on his order.

Gentlemen, I mean absolutely no disrespect to you or any of you as I say that, but as a theoretical proposition, as a legal proposition, it is my judgment that it violates the due process guarantees of the State and Federal Constitution. It is my judgment that any man who sits in judgment on another should not ever have to consider anything but the burden or proof. It is my view that as members of the Department

of Public Safety, whose service my client used to serve at the will and pleasure of the Superintendent, but finally in a theoretical sense that as I would suggest to you in a very real sense you are under somewhat of a disability and in that respect I suggest to you that my client is prejudiced.

Finally, just to address myself to the Constitutional question. I have suggested in my applications for injunctive relief that there was the possibility of constitutional jeopardy. I have suggested to you that by proceeding under this very statute that gives you birth, there are constitutional infirmities and I had suggested that due process requires independent judgment, an opportunity to discover your opposition and I say that keeping in mind that we're dealing with a man who is a member

of that Department of Public Safety for 17 years who as I think your records will sufficiently reflect was summarily discharged on January the 16th.

* * *

APPENDIX B

EXCERPTS FROM "SUBSTITUTED PETITION FOR APPEAL FROM ORDER OF ADMINISTRATIVE TRIBUNAL" IN THE CIRCUIT COURT OF KANAWHA COUNTY

This is an appeal authorized under Chapter 15, Article 2, Section 6 (§15-2-6) of the West Virginia Code, from an order of the Board of Appeals of the Department of Public Safety convened by special order of the Superintendent of the Department of Public Safety under §15-2-6, West Virginia Code. Said order of the Board of Appeals was dated April 14, 1980. It sustained appellee H. F. Mooney's order discharging appellant Robert Julian Taylor from the Department of Public Safety. This appeal was filed on June 12, 1980 and an order entered on June 12, 1980, by Circuit Court Judge Andrew McQueen, granting such leave to appeal.

* * *

FACTUAL BASIS OF CASE ON APPEAL

1. Taylor, a resident of 2201 Lincoln Avenue, Parkersburg, West Virginia, was a member of the Department of Public Safety from April 1, 1962, until discharge on January 16, 1979. He held the rank of Corporal and was the Detachment Commander of the Paden City Detachment located in Tyler County, West Virginia, from February 1, 1976, until the date of his discharge.

2. The Defendant Mooney is and was at all times pertinent, the Superintendent of the Department of Public Safety holding, by statute (§15-2-2, West Virginia Code), the rank of colonel. Acting on information, the nature of which was not made known to Taylor, Defendant Mooney, on January 11,

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1979, by something called "Special Order No. 7", ordered one of his subordinates, a Lt. R. S. Fink of the Department of Public Safety to investigate certain allegations against Taylor of wrongdoing in his official conduct.

3. Lt. R. S. Fink, acting as defendant Mooney's agent, investigated the allegations by taking four unsworn statements (one on January 13, 1979 and January 14, 1979, one from Edward Thomas Wasmer, Jr., on January 13, 1979), each statement representing a series of responses to leading and highly suggestive questions posed by Fink; by reading one unsworn narrative statement by said Grove made on January 10, 1979; and by assuming Taylor should have known of a routine departmental teletype reporting a suspected larceny of four radios.

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4. Said Lt. Fink, during the course of his investigation met with Taylor on three occasions and generally told Taylor, but not in detail, that he, Taylor, was under investigation. On none of the three occasions was Taylor permitted to see or given an opportunity to read the statements Fink had collected. On none of the three occasions was Taylor given the opportunity to respond to the accusations or innuendo within the purview of Department of Public Safety General Order #10, "Internal Investigations", Paragraph 11, and at no time were Taylor's rights under said Order #10, Paragraph 11, read to him or otherwise made known to him. On none of the three occasions was Taylor otherwise given a fair opportunity to respond to the accusations or innuendo. On the third of the three

occasions, on January 15, 1979, Taylor specifically asked Fink to see the statements Fink had collected, and Fink consulted immediately with defendant Mooney by telephone, by which telephone conversation defendant Mooney ordered Fink not to allow Taylor to see the statements he had collected. Further, defendant Mooney ordered Fink to order Taylor to be in Mooney's office in Charleston, West Virginia, the next morning, January 16, 1979, but Taylor was not told for what purpose.

5. On January 16, 1979, Taylor appeared with his attorney in Defendant Mooney's office. At that meeting without giving Taylor or his attorney an opportunity to respond to the accusations or innuendo against Taylor or otherwise to know the evidence on which defendant Mooney's inference of Taylor's

misconduct was based or otherwise to explain, and in spite of numerous requests for such opporutnity made by Taylor and his attorney, defendant Mooney personally signed and served upon Taylor a written instrument called Special Order #10, an instrument prepared in advance of the meeting, and an accompanying letter, addressed to Taylor, also prepared in advance. Special Order #10 discharged Taylor from the Department of Public Safety forthwith. The letter accompanying the discharge order gave no reasons for the discharge the violation of six (6) numbered sectios of General Order Number 9 of the Department of Public Safety.

* * *

6. Taylor filed an appeal of such order of discharge as was authorized by §15-3-6, of the West Virginia Code.

Such appeal is to an ad hoc Board of Appeals picked by lot from defendant Mooney's subordinates in the Department of Public Safety.

7. Such Board of Appeals is mandated by §15-2-6, to have no member of Taylor's rank among its seven members. Such Board of Appeals is to have one member each from the other seven ranks of trooper through captain, and the Board of Appeals actually picked was composed of persons holding the following ranks: captain, lieutenant, master sergeant, first sergeant, sergeant, trooper first class, and trooper. Each of these ranks is in the chain of command of the Department of Public Safety headed by the Superintendent, defendant Mooney, who holds the rank of colonel.

* * *

11. A hearing was held from March 15, 1979 to March 20, 1979, at the West Virginia State Police Academy, Institute, West Virginia, before the ad hoc Board composed of seven subordinates of defendant Mooney (designated as "Appellee," in the hearing record), who, according to §15-3-7, West Virginia Code, unnumbered paragraph five, had the burden of proof, who was represented by counsel from the Attorney General's Office, and who was otherwise throughout the hearing treated as a party in the litigation sense. At all times during the hearing, the hearing was treated as an adversing process between Taylor, designated as appellant, on one side, and defendant Mooney, designated as appellee, on the other side.

LEGAL BASIS OF THE CASE ON APPEAL

A. Respondent's acts, above set forth, deprived Taylor of property and ilberty without due process of law in violation of both the West Virginia constitution Article 3, §10 and the Fourteenth Amendment of the United States Constitution in the following particulars:

1. Taylor was deprived of notice and an opportunity to be heard before discharge;

2. Taylor was deprived of right to have a neutral official make the prehearing inference of probable cause for discharge because --

a) the investigating officer (Lt. Fink) on the scene cannot be and was not here neutral.

b) the official making the prehearing decision, defendant Mooney,

was not neutral in that he initiated the investigation on certain information and he personally controlled the investigation during its course, and

c) it was not based on first hand knowledge or statements under oath;

3. The rules or standards Taylor was alleged to violated were too vague to give adequate notice of what was an acceptable standard of conduct or to allow him to prepare his defense once the rules were alleged to be violated;

4. Taylor was not given adequate time to prepare his defense, nor allowed neutral discovery or compulsory process to present his own evidence;

5. No stay of the discharge was granted pending the appeal;

6. The Board was an inherently biased hearing tribunal because it was composed entirely of subordinates of one of the parties, defendant Mooney, which party had the burden of proof (although called appellee) and although the actual selection was by lot from a pool of all of defendant Mooney's subordinates, each of the seven members of the Board was formally ordered to his task as a hearing officer by one of the parties to the hearing, who also had the sole authority to relieve each and/or any of them at their own request, for cause. The inherent bias of an administrative hearing board composed entirely of subordinates of one of the contesting parties is compounded where the subordination is in the context of a military type organization replete with "chain of

command", efficiency reports and strict hierarchical protocol.

7. The inherent bias of the subordinate hearing board was exacerbated by the Board's refusal to allow any inquiry of its membership to ascertain the possible existence of individual bias.

8. The interent bias of the subordinate hearing Board was further exacerbated and its inadequacy further compounded by the Board's refusal to have present at the hearing an independent legal advisor, and still further the remote legal advisor that was available was from the same legal office (the Attorney General's Office) as the attorney for one of the parties, and further, even still, such remote legal advisor was then not consulted on

difficult legal matters or when Taylor so requested.

9. The Board had available to it and consulted evidence not admitted at the hearing.

10. The Board allowed evidence to be received at the hearing that was unsworn and uncross-examined.

11. The Board used a standard for making its decision entirely inappropriate to a trial hearing and fundamentally unfair; that standard is "sufficiency of the evidence to sustain", a standard that is analogous to, but even weaker than the substantial evidence rule, a standard appropriate only to the review on the record of a decision made by someone else, and a standard that essentially allows the decision maker to ignore the substantial evidence on the other side, the side not

prevailing below, here, the already, at the time of the hearing, discharged Taylor. The trial standard of preponderance of the evidence that § 15-2-6, West Virginia Code may imply as required would at least force the decision maker to weigh the conflicting evidence, but where, as here, a decision defames as well as cuts off employment of long and unblemished duration, fundamental fairness demands at least the higher equity standard of proof, i.e. clear and convincing evidence.

B. Without regard to the numerous deprivations of procedural due process listed in A, above, the Record made before the Board of Appeals does not contain substantial evidence when viewed as a whole to support the Board's findings.

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PRAYER FOR RELIEF

The following additional questions are raised on this appeal:

a) order that Taylor be immediately reinstated in the Department of Public Safety at his former rank of corporal with full payment of any compensation withheld and with full credit for service between the date defendant Mooney issued his discharge order to the date of reinstatement;

b) order the payment by the Department of Public Safety of the full cost to Taylor of protecting his constitutional rights, including all hearing and litigation costs and reasonable attorney's fees; and

c) grant him such other relief as is appropriate.

ROBERT JULIAN TAYLOR

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:hael S. Francis
:NNAN & FRANCIS
O. Drawer 68
Martinsville,
Vest Virginia 26155

ies A. McLaughlin,
counsel

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APPENDIX C

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

ROBERT JULIAN TAYLOR,

Plaintiff & Appellant,

vs. CIVIL ACTION NO. AP-CA-80-78

H. F. MOONEY, JR., individually, and as Superintendent of the West Virginia Department of Public Safety and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor,

Defendants & Appellees.

APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with this court's authority under ¶15-2-7, W.Va. Code, to "determine all questions submitted to it on appeal" and since, according to the State Administerative Procedures Act, §29A-5-4(9), W.Va. Code, such questions may include whether "the substantial rights of the petitioner ... have been

prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) in violation of constitutional ... provisions; or ... (3) made upon unlawful procedures; or ... (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record ...," this court makes the following findings of fact and conclusions of law (see Harrison v. Ginsberg, 286 S.E.2d 276 (W.Va. 1982), both as to whether constitutionally mandated procedures were followed and as to whether the Appeal Board's order was clearly wrong in view of the reliable, probative and substantial evidence on the whole record:

Findings of Fact

1. The Board of Appeals selected under § 15-2-7, W.Va. Code, by the

superintendent of the Department of Public Safety, who was an active, not nominal, party at the discharge hearing, would have, no matter who the individuals actually selected might be, and have an inherent bias in favor of the party who was their employer, and commander-in-chief and against the party who was no longer their peer but now a civilian outsider. Such inherent bias is inferred both from the natural perception of a pecuniary interest each member of the board would have in maintaining his position and gaining promotion within the department and from the naturally strong influence a commander has over his subordinates in a military type organization, which the Department of Public Safety is.

2. The inherent bias of the board was exacerbated by the board's not

allowing individual voir dire of the members of the board of appeals and, by the fact that no neutral legal officer was available to aid the board.

3. Appellant was not afforded a meaningful opportunity to respond to the charges against him prior to his discharge on January 16, 1979.

4. The entire case against appellant was based on the testimony of witness Grove, who, because of prior statements wholly inconsistent with the incriminating aspects of that testimony, and who otherwise was of dubious credibility, was not a reliable witness, and therefore the testimony of witness Groves was either reliable, probative nor substantial.

5. There was no other evidence on the record from which it could be reasonably inferred that appellant

either knew or should have known that the radios he was charged with having guilty knowledge of, as the sole basis of his discharge, were stolen radios.

(Alternate) 5. Other than the unreliable Grove testimony, the record contains no evidence whatever to support the charges on which appellant's discharge was predicated.

Conclusions of Law

Based on the above findings of fact and on the law of the United States and of the State of West Virginia, this court reaches the following conclusions of law (with the particular findings and law supporting each conclusion cited therein):

1. The Board of Appeals convened to hear the appeal by appellant, Robert Julian Taylor, of his summary discharge as a non-probationary member of the

Department of Public Safety (a position in which appellant has a property interest) was not an unbiased and an impartial tribunal; therefore, the hearing and decision of the board were in violation of appellant's substantial rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article III, Section 10 of the Constitution of West Virginia. (Findings of Fact 1 and 2 and State ex rel. Ellis v. Kelly, 145 W.Va. 70, 74-76, 112 S.E. 2d 641, 644-45 (1960) and Syllabus Points 2 and 3 thereof.)

2.Appellant was denied a meaningful opportunity prior to discharge to respond to allegations or charges against him in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United

States Constitution and Article III, Section 10 of the Constitution of West Virginia. (Findings of Fact 3 and Mackey v. Montrym, U.S. 99 S.Ct. 2612, 2619 (1979); Waite v. Civil Service Comm., 241 S.E.2d 164 (W.Va. 1978); c.f. Bone v. West Virginia Department of Corrections, 255 S.E.2d 919 (W.Va. 1979).

3. Appellant was denied a full evidentiary hearing prior to his discharge from his permanent rank and position in the Department of Public Safety in violation of rights guaranteed by Article III, section 10 of the Constitution of West Virginia. (Findings of Fact 3 and Yanero v. Fox, 2565 S.E. 2d 751 (W.Va. 1979); North v. West Virginia Board of Regents, 233 S.E.2d 411, 413 (and Syllabus Point #3) (W.Va. 1977).

4. Based on any one or all of the preceding three conclusions of law, the court further concludes that appellant's discharge was in violation of his right to due process of law and any such discharge is a mullity.

5. Based on the reliable, probative and substantial evidence in the whole record, the decision of the Board of Appeals to affirm the discharge of appellant Taylor was clearly wrong. (Findings of Fact 4 and 5 and § 29A-5-4(g)(5), W.Va. Code.)

WHEREFORE, the order of the Board of Appeals affirming the order of the superintendent of the Department of Public Safety discharging appellant Robert Julian Taylor on January 16, 1979 from his permanent position in the Department of Public Safety is hereby reversed, and the present superintendent

of the Department of Public Safety is ordered to return the petition to his status prior to January 16, 1979, as corporal of the uniformed service with full paymkent of the compensation that would have been due him from the date the superintendent issued his order dismissing appellant to the present date, and with full credit for service between the said dismissal date and the present date. It is further ordered that the superintendent pay petitioner such sum of money equal to the reasonable attorney fees actually paid and that were necessary to protect his legal interests.

_____

Judge of said Court

APPENDIX D

(Excerpts from Petition for Appeal to Supreme Court of Appeals of West Virginia)

II. Statement of Facts.

In 1979, Petitioner R. J. Taylor was a corporal in the state police with nearly seventeen (17) Years of "unblemished service." (Superintendent Mooney's testimony, Transcript of Board Hearing p. 95 (Tr. 95).) He was the Paden City detachment commander. On January 15, 1979, he was told by a higher ranking state police officer, Lt. R. S. Fink, to be in Superintendent Mooney's office in Charleston the next morning, January 16, 1979. Fink told Taylor to bring his lawyer. Fink did not give Taylor any written notice of

charges against him and did not, at that time, otherwise inform him of any specific charges against him and did not tell him what was the purpose of his going to Charleston. Fink had told Taylor two (2) days before (January 13, 1979) that Taylor was under investigation, that the investigation concerned Taylor's possible knowledge of, and complicity in, the theft of several walkie-talkie radios, and that he, Fink, had taken several statements that implicated Taylor. (Tr. 374) He did not give a copy of the statements to Taylor or allow him to read the statements or read the statements to him either then or at any time prior to Taylor's meeting with Superintendent Mooney on January 16, 1979. (Tr. 349) In fact, when Taylor specifically requested to see the statements at a

meeting with Fink on the evening of January 15, 1979, Fink called Superintendent Mooney for instructions and got the following instructions:

> "The General advised me that I should not let Corporal Taylor read those statements and, further, that I should cause Corporal Taylor to be in Department Headquarters the ollowing day at noon. (Tr. 349) (See also Mooney's testimony, Tr. 65)

On January 16, 1979, Mooney, in the presence of his first assistant, Lt. Col. Beverly, and his specially assigned assistant attorney general, met with Taylor and his attorney in Mooney's office. Mooney had talked to Fink on the morning of the 15th prior to meeting with Taylor. Mooney later reported: "There was never a doubt in my mind from

the time that Fink talked to me on the morning of the 15th that Taylor was guilty as charged." (Tr. 97) At the meetig on the 16th, Mooney offered to allow Taylor to resign in lieu of discharge. Taylor refused, protested his innocence, and was handed Special Order No. 10 discharging him from the Department forwith. (Tr. 66) Lt. Col. Beverly later testified to the same effect as the statement by Mooney quoted above: the decision to discharge Taylor was made prior to the meeting with Taylor and his attorney. (Tr. 112, 113) Taylor was not allowed to see the evidence against him at that meeting or to answer it. (Tr. 541)

* * *

III. Assignments of Error.

A. The Circuit Court erred in finding the process used for firing to be constitutional under Both Article III, §10 of the West Virginia Constitution and the Fourteenth Amendment of United States Constitution. In particular:

(1) The Departmental Appeals Board as constituted under § 15-2-6, W.Va. Code, was by its very make up not an impartial tribunal.

(2) The inherently biased-as-constituted board's impartiality was further unconstitutionally compromised by absolutely refusing to allow any voir dire of its membership and by having no independent legal officer to advise it.

(3) Under the procedures as outlined in §15-2-6 and as further

adumbrated by the Attorney General at the hearing the Board cannot reasonably be believed to have rendered a de nova judgment, but rather were reviewing the reasonableness of their commander's prior ex parte judgment, thus petitioner has had no meaningful evidentiary hearing at all.

B. Circuit Court erred in finding that there was substantial evidence to support the Appeals Board's decision since that decision was based entirely on testimony that was not credible as a matter of law.

IV. Points and authorities relied upon, discussion of the pertinent law, and the relief prayed for.

This part of the petition is divided into three parts: (A) Points and Authorities, (B)

Discussion, and (C) Prayer for Relief.

A. Points and Authorities

1. The Circuit Court erred in finding that the procedure used by the superintendent of the Department of Public Safety to discharge petitioner was constitutional. In particular, the procedure used was unconstitutional because:

(a) Petitioner was discharged prior to having any fair opportunity to respond to the charges. This violates both the Federal and State constitutions. The principal cases from this Court that petitioner relies on in support of his claim are Waite vs. Civil Service Comm., 241 S.E.2d 164 (W.Va. 1977); State ex rel. Yanero vs. Fox, 256 S.E.2d 751 (W.Va. 1979). The principal federal cases are Mackey vs. Montrym,

443 U.S. 1, 99 S.Ct. 2612 (1979); and Barry vs. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1970). Because a police officer is especially important to the protection of the public, he can be suspended or even discharged for gross misconduct where the facts are personally known to his superiors (as where he repeatedly refuses to obey a direct lawful order.) Bone vs. West Va. Department of Corrections, 255 S.E. 2d 919 (W.Va. 1979). Here, even if what Taylor was accused of doing could be characterized as "gross" (a dubious proposition) nonetheless the facts were not personally known to any supervisor or anyone else in the department in the way that obviated the absolute necessity of a prior hearing in Bone. As an umpire needs no hearing because he sees the ball and strikes so a supervisor needs no hearing when he

sees the gross misconduct. Insofar as State ex rel. Gooden vs. Bonar, 155 W.Va. 202, 183 S.E.2d 697 (1971) holds that no procedure is constitutionally necessary prior to the discharge of a state police officer it should be overruled as obsolete in light of later decision by this Court and the United States Supreme Court.

(b) The hearing that was afforded petitioner after he was discharged was before an ad hoc body of seven subordinates of the discharging officer who was also (1) the convening authority of the panel, (2) an official, active and testifying party at the hearing where he was represented by the Attorney General, who put on the "Superintendent's case." Moreover this party, officially the "appellee" (but with the burden of proof), had authority to

promote, transfer, suspend and discharge, ostensibly without hearing (as the very case before them illustrated) each member of this panel reviewing his discharge order and even had the authority to demote at his will and pleasure the officer who presided at the hearing. §15-2-4, W.Va. Code. Furthermore, this ad hoc panel had no formal legal training, no formal or informal training as hearing officers and had as their legal advisor (but not present) the Attorney General. Thus the Attorney General and his staff both represented one of the parties to the hearing and advised the hearing panel on legal issues. Finally the hearing panel refused petitioner's request to voir dire the panel individually or collectively before the hearing commenced. Petitioner relies chiefly on State ex

rel Ellis vs. Kelly, 145 W.Va. 70, 112 S.E.2d 641 (1960), a case directly on point but not cited by the Attorney General or the Circuit Court below. Nor were any of the other West Virginia cases that petitioner relies on cited by the Attorney General: Moats vs. Janco, 154 W.Va. 887, 180 S.E.2d 74, (1971) Osborn vs. Chinn, 146 W.Va. 610, 1212 S.E.2d 610 (1961), Williams vs. Brannen, 116 W.Va. 1, 178 S.E. 67 (1935), and City of Grafton vs. Holt, Judge, 58 W.Va. 182, 52 S.E.21 (1905).

The federal cases relief on are Gibson vs. Barryhill, 411 U.S. 564 (1973), Ward vs Village of Monroeville, 409 U.S. 57 (1972); Tumer vs. Ohio, 273 U.S. 510 (1927).

By way of contract, what this case is not, it is not petitioner's

contention that we have here an impermissible combination of investigative and adjudicative functions. Had the superintendent investigated the case, found probable cause (sufficient even to suspend) and then himself tried the ultimate fact, we would have a much weaker case. Withrow vs. Larkin, 421 U.S. 35 (1975).

(c) The inherent bias of th hearing panel as constituted was further exacerbated by the panel's confusion as to its role: Was it making a decision de novo, or merely reviewing the decision of its superior? Petitioner here relies on all the cases mandating procedural due process in the discharge setting. Somewhere along the way, petitioner was at least entitled to one full de novo hearing. Petitioner

received only the form of a de novo hearing, but not its substance.

2. There was not substantial reliable evidence to support the discharge. The one witness with knowledge of the case made two written predischarge statements containing no evidence from which it could reasonably be inferred that petitioner had the guilty knowledge for which he was fired. This witness, at the hearing, contradicted that prior statement, took the Fifth Amendment on one question, and refused to answer and was not forced to answer as to possible "deals" he had made with the Department of Public Safety or the Attorney General.

APPENDIX E

(Excerpts from Exhibits Before the Board of Appeals)

DEPARTMENT OF PUBLIC SAFETY
(WEST VIRGINIA STATE POLICE)
725 Jefferson Road
Charleston, West Virginia 25309

January 16, 1979

SPECIAL ORDER)
)
NUMBER 10)

1. The following named member of the Department of Public Safety is hereby discharged for cause from the Department of Public Safety. Letter dated January 16, 1979, sets forth cause and justification. Discharge is effective January 16, 1979.

CORPORAL R. J. TAYLOR

2. All clothing and equipment now in possession of Corporal Taylor will be turned over to his Commanding Officer for return to the Supply Office.

3. Corporal Taylor is entitled to a refund of deduction of salary on account of the Death, Disablity and Retirement Fund of the Department of Public Safety.

/s/ H. F. Mooney, Jr.
H. F. MOONEY, JR.
SUPERINTENDENT

EXHIBIT 2

OFFICIAL:
Lt. Colonel R. M. Hall
INSPECTOR

cc: Ltc. Beverley
Ltc. Hall
Maj. Donohoe
Companies A, B, C, D, E
Academy
Aviation
Bookkeeping

CIB/CIS
Crime Prevention
Governor's Security
Det. Commander

Communications
Graphic Arts
Legal Division

Member Affected
Personnel
Personnel File
Planning & Research
Printing
Supply

TR & SD
UCR
Dist. Sergeant

DEPARTMENT OF PUBLIC SAFETY
(West Virginia State Police)
725 Jefferson Road
South Charleston, West Virginia 25309

January 16, 1979

Corporal R. J. Taylor
West Virginia State Police
Paden City, West Virginia 26159

Dear Corporal Taylor:

On January 11, 1979, I received information regarding the theft of certain radio equipment and of your possible involvement in that theft. I caused an investigation of these allegations to be conducted and Lieutenant R. G. Fink was assigned as the investigating officer.

That investigation has been completed and substantiates that you have violated Paragraphs 1, 3(a), 3(c), 3(g), 5(b), and 9 of General Order Number 9, in that: You associated with Jerry Fulks, an employee of Mobay Chemical Corporation and that you and Jerry Fulks associated and consulted with James Groves regarding the use, adaptation and/or modification to employ as a communications system between yourself and others. This radio equipment and the battery charers, which you knew or had reasonable cause to believe to be stolen, contained certain designations and serial numbers which established it

EXHIBIT 3

as property of Mobay Chemical Corporation. The theft of property from Mobay was under investigation by this Department a State message listing the property with corresponding serial numbers had been issued by the Moundsville Detachment. Having such knowledge, you failed to take appropriate action regarding such stolen property and to perform the duties required of a member of the Department of Public Safety in a lawful and efficient manner.

For these reasons, I have by Special Order, this date, discharged you as a member of the Department of Public Safety.

Sincerely,

/s/ H. F. Mooney, Jr.
H. F. MOONEY, JR.
SUPERINTENDENT

HFM/EFW/pet

RULES OF CONDUCT

General Order Number 9

1. No member shall knowingly and intentionally violate the laws of the United States or the State of West Virginia.

2. No member shall refuse to obey a lawful order of his superior officer, irrespective of whether such superior officer shall be a commissioned officer, non-commissioned officer or member of the department senior to himself. Refusal to obey a lawful order means:

(a) To violate or fail to obey any lawful order or regulation;
(b) To fail to obey any lawful order or regulation of which the member has knowledge and which it is his duty to perform;
(c) To be derelict in the performance of any lawful order or regulation.

3. No member shall neglect the performance of his official duties. Neglect of duty means:

(a) The failure to perfrom an assigned or requiredI duty in a reasonably prompt, efficient and proper manner;

APPELLANT'S EXHIBIT 1

(b) To willfully feign illness or otherwise attempt to shirk his duty;

(c) To willfully refuse to perform any police duty that comes to the attention of a member;

(d) To perform principal and substantial duties in such a manner as to constitute gross inefficiency;

(e) To be absent from duties without proper authority;

(f) To neglect to give full attention to duties by accepting employment with any person, firm, partnership or corporation under any circumstances;

(g) To fail, refuse or be derelict in complying with all general orders, special orders, department memoranda and notices, and regulations contained in the staff or field operations manual.

4. No member shall drink intoxicating liquor or beer while in uniform. Alcoholism constitutes sufficient grounds for discharge from the service.

5. No. member shall abuse the authority vested in him by law, order or regulation. Abuse of authority means:

(a) Failure to deal with the public in a courteous, kind, patient and respectful manner;

(b) Failure to discharge official duties in an impartial manner;

(c) Knowingly and willfully disclosing confidential business of the department to individuals not authorized to receive such information;

(d) Signing, with intent to deceive, any false record, return, regulation order, or other official document, knowing it to be false;

(e) Knowingly making any other false official statement.

6. No member shall participate in political activities, primaries, conventions or elections. Participation means:

(a) Filing as a candidate for office in any federal, state or municipal primary or general election;

(b) Serving as a leader or officer of any political organization or representative or delegate to any political party convention;

(c) Holding any public office other than the office of a member of the department;

(d) Making speeches for a political organization or candidate or publicly endorsing a candidate for public office;

(e) Serving as an officer or member of any committee, group or organization having as its purpose the election, nomination or defeat of any candidate for federal, state or municipal office or any referendum or constitutional amendment;

(f) Soliciting funds in behalf of any candidate, political party committee or political organization.

Nothing in this order shall be construed to restrain a member from the unfettered exercise of his right of franchise or his privilege of tendering personal financial support of political candidates or issues.

7. No member shall carry any weapon or enforcement equipment in the discharge of his official duties, the use of which is not authorized by general order.

8. No member shall convert property of the state of west Virginia through a negligent or willful act. Convert means:

(a) to seel or otherwise dispose of;
(b) To willfully or negligently damage, destroy or lose;
(c) To suffer to be lost, damaged, destroyed, sold or wrongfully dispose of.

9. No member shall conduct himself in a manner unbecoming a member of the Department.

10. No member shall strike or draw or lift up any weapon or offer any violence against a member of the Department.

11. No member shall accept, or agree to accept, directly or indirectly, any bribe, gift, token gratuity, thing of value or pecuniary benefit to perform or refrain from performing any official act.

INTERNAL INVESTIGATIONS

GENERAL ORDER NUMBER 10

1. Upon receiving a complaint from any citizen or member of the Department of a violation of the law or a violation of a Department regulation on the part of any member, the person reciving the complaint shall advise the Superintendent, through channels, and notify the Inspector, forwarding such information as may be available.

2. All complaints must be reduced to writing and signed by the person who has brought the matter to the attention of the Department. Complaints, which appear justified and are received by telephone, shall be pursued only when the complaining party provides his full name, address and telephone number.

3. The Inspector shall notify the member or members adversely affected by the complaint, the immediate supervisor and the appropriate commanding officer of the nature of the complaint. Where dishonesty of a member is suspected, the Inspector shall determine when the member affected is to be advised.

4. If the complaint sets forth allegations which, on their face, constitute a minor violation of Department regulations or the laws of the State of West Virginia, the Inspector shall require the member or members

affected to submit a written explanation of the facts bearing upon the allegations contained in the complaint within five days.

5. Upon receipt of the written explanation regarding the complaint, the Inspectro shall, if the complaint is founded, issue, in the name of the Suprintendent, a written or oral reprimand or take such other appropriate action as he may deem necessary, including a recommendation to the Superintendent that disciplinary action be taken pursuant to West Virginia Code, 1931, 15-2-21, as amended, or a formal investigation be ordered. If the complaint is unfounded, the Inspector shall designate on the complaint that no further action is required. In each case, the inspector shall notify, in writing, the member or members affected, the immediate staff supervisor or the appropriate commanding officer and the Superintendent of his findings.

6. If a complaint sets forth allegations which, on the face, constitute a serious violation of Department regulations or laws of the State of West Virginia, the Superintendent shall direct that a formal investigation be conducted. He shall assign, by special order, a member of equal or greater rank than the member or members affected to investigate the allegations of the complaint; but in no event shall a member assigned to investigate a complaint be from the same company or division as the member or members

investigated, nor shall the investigator be of less rank than sergeant.

7. Upon completion of the investigation, the investigating officer shall submit a report to the Inspector setting forth a narration of the incident upon which the complaint is based, his findings of fact and evidence in support of such findings and his conclusions regarding the results of the investigation. The Inspector shall forward a copy of the report to the member or members affected and to the immediate staff supervisor or appropriate commanding officer.

8. Upon receipt of the investigation report, the Inspector shall forward it to the Superintendent together with his recommendation for properly disposing of the complaint. If the complaint is justified, the Inspector shall recommend that disciplinary action be taken or that charges be filed against such member or members. If the complaint is unfounded, the investigating officer shall recommend the investigation be discontinued and the case closed.

9. The Inspector shall notify the member or members affected, the immediate staff supervisor or the appropriate commanding officer that either the case has been closed or that disciplinary action has been recommended to the Superintendent.

10. When a complaint has been determined justified, a copy of the

investigation report shall become a permanent part of the respective member's personnel file. In those cases where the complaint is determined to be unfounded, the investigation report shall be placed in the Inspector's internal investigation file. No other copies will be retained or filed. The Inspector's internal investigation file, as well as the member's personnel file, shall be confidential and can be disseminated only at the direction of the Superintendent or of the member investigated. This order shall not be construed to prohibit access to individual personnel files by authorized members and employees of the Department of Public Safety.

11. During any investigation conducted pursuant to the provisions of this General Order, whenever there is a likelihood that criminal charges may result from the investigation, the following warnings shall be given the member or members affected prior to the commencement of the interrogation:

> "I wish to advise you that you are being questioned as part of a formal investigation of the Department of Public Safety. You will be asked questions specifically directed and narrowly related to the performance of your official duties. You are entitled to all the rights and privileges guaranteed by the laws of the State of West Virginia, the Constitution of West Virginia or the Constitution of the United States,

including the right not to be compelled to incriminate yourself and the right to have legal counsel present at each and every stage of this investigation."

"If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings. However, these statements may be used against you in relation to Department charges."

12. It shall be a violation of this General Order to obstruct, hinder or impede internal investigations or hearing procedures or to knowingly conceal or misrepresent material facts relating to the subject matter of the inquiry or to fail to fulfill any of the above described duties and responsibilities.

FILED IN THE OFFICE OF
SECRETARY OF STATE OF
WEST VIRGINIA

THIS DATE_____